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AUTHOR Burling, Philip
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ABSTRACT

This booklet explains the actions that college or university administrators should take to prevent or respond to incidents of acquaintance rape ("date rape") on campus. It outlines specific preventive measures, risk management procedures, and internal disciplinary procedures for acquaintance rape cases. Institutions should define acquaintance rape in the most direct terms and prohibit it in its conduct code. It should then convey the prohibition in ways carefully selected to reach and impress potential victims and potential rapists. The institution should also make plans to manage the way in which acquaintance rape cases are handled, making sure that appropriate training, protocols, and response team procedures are in place. Finally, colleges and universities should construct appropriate disciplinary procedures for dealing with a charge of acquaintance rape. Institutions must create a fully-detailed code of procedure, including a standard of proof, a rule of evidence, the grounds for appeal, and the sanctions to be imposed. Seven appendixes provide a list of resources, a sample victim's bill of rights, a sample protocol for victims of sexual assault, a sample job description for a coordinator of sexual assault, a sample services, victim assistance guidelines, a sample acquaintance rape policy statement, and a sample fraternity policy statement. (MDM)

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Phillip Burling is a graduate of Harvard College, Oxford University and Harvard Law School. He is a partner in the Boston law firm of Foley, Hoag & Eliot. Since 1972, Mr. Burling has been University Counsel to Boston College. He specializes in school and college law, representing several New England secondary and postsecondary educational institutions. He is a member of the Risk Management Advisory Committee of United Educators/SCUUL. Among his community activities, Mr. Burling is Chair of the Trustees of The Artisans School, a college recently founded in Maine, and is Secretary of New England Medical Center. He is the author of two other NACUA publications, *Crime on Campus: Analyzing and Managing the Increasing Risk of Institutional Liability* and *Responding to Whistleblowers: An Analysis of Whistleblower Protection Acts and Their Consequences.*

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The views expressed herein are to be attributed to the authors and not to the National Association of College and University Attorneys. The information appearing in this publication is presented for information purposes only and should not be considered legal advice or be used as such. For a specific legal opinion, readers should confer with their own legal counsel.

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Acquaintance Rape on Campus: A Model for Institutional Response

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Acquaintance Rape on Campus: A Model for Institutional Response

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Acquaintance Rape[1] on Campus: A Model for Institutional Response

Introduction

Sexual assault, including acquaintance rape, is a serious but often unreported crime on college[2] campuses[3]. In approximately ninety percent of the incidents of sexual assault, the attackers are described as acquaintances[4]. Despite these frightening statistics, American institutions of higher education have only recently begun to react to what amounts to an epidemic on their campuses[5]. In many cases, an institution's first encounter with a charge of acquaintance rape is disastrous. An experienced judge described the record of one university's response to a charge of rape in the following words:

> [T]he hearing held by the university was conducted without a semblance of due process: hearsay, rumor, and conjecture were admitted in evidence; even though there were dozens of eye witnesses, none was called to testify; and members of the university investigating staff sat on the hearing body. This most irregular procedure was followed even though counsel for the university had been consulted during the investigation and was present during the hearing.[6]

Rape is so foreign to the concept of the academy as a community of scholars that it may be historically understandable that colleges and universities are unprepared for this crisis. However, no administrator should take more than passing comfort from this apology. Much more than any other campus crime, acquaintance rape has the

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1. The term "acquaintance rape" is used throughout this paper in preference to the more common term "date rape" in order to convey the sense that the vast majority of rapes of this sort involve two parties who have met before the actual crime occurs. This acquaintanceship, however, need not involve a "date." More often, the factor which distinguishes acquaintance rape from "stranger rape" is just enough familiarity for the woman to let down her guard.

2. The terms college, university, school, and institution of higher education are used interchangeably, and each is understood to stand for the others. The victims of rape are understood to be women. While men can be victims of rape, the overwhelming majority of rape victims are women. Our focus here is exclusively on incidents in which men are the rapists and women are the victims. *But see*, Cindy Struckman-Johnson, *Male Victims of Acquaintance Rape*, *in* ACQUAINTANCE RAPE: THE HIDDEN CRIME 192 (Andrea Parrot & Laurie Bechhofer eds., 1991).

3. Esther S. Tanzman, *Unwanted Sexual Activity: The Prevalence in College Women*, 40 J. AM. COLL. HEALTH 167 (1992). *See also* Mary P. Koss, Christine A. Gidycz & Nadine Wisniewski, *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 J. CONSULTING & CLINICAL PSYCHOL. 162, 168 (1987). (Survey estimated one in four college women will have been the victim of a serious sexual assault—either rape or attempted rape—by the time of their graduation.)

4. National Center for the Prevention and Control of Rape Study, *cited in The Date Who Rapes*, NEWSWEEK, April 9, 1984, at 91; Ms. Magazine Campus Project on Sexual Assault Study (Mary P. Koss, director), preliminary results *quoted in* Ellen Sweet, *Date Rape: The Story of an Epidemic and Those Who Deny It* (*Results of Ms. Study* (sidebar)), MS., October 1985, at 56, 58.

5. Claudette McShane, author of WARNING: DATING CAN BE HAZARDOUS TO YOUR HEALTH, testimony before Wisconsin State Legislature (1985), *quoted in* Eileen M. O'Brien, *Date Rape: Hidden Epidemic Makes Campuses Unsafe for Women*, BLACK ISSUES IN HIGHER EDUCATION, Dec. 7, 1989, at 6.

6. Judge Lois G. Forer, *Foreward to* PEGGY REEVES SANDAY, FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS xiii, xvi-xvii (1990).

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potential to shatter a college community. The typical case involves two students, one of whom is charging that the other committed a crime second only in abhorrence to murder, while the other is claiming that he did nothing different from what any other male student might have done. They will have two very different versions of what happened, either of which will be more or less believable. In far too many cases, alcohol will have affected their judgment. No institution will find it comfortable choosing between these competing claims.

The second problem flows from the seriousness of the crime itself. For the victim, rape is shatteringly traumatic; for a rapist, punishments are potentially capital. Sadly, whatever the outcome, the process of resolving a charge of rape is very likely to destroy the relationship between the college and both its students. Acquaintance rape cases are rarely matters in which the college's disciplinary system has an effective educational component; consequently, the normal processes of institutional discipline have little utility.

Finally, the institution, itself, will be placed on trial in all but a few instances. Unless its public reaction to a charge of rape and the procedures through which it resolves that charge have been drafted specifically for incidents of acquaintance rape, the institution will be assailed by the community and the public at large, and may well be sued for failure to protect the interests of either or both of the students involved.

In addition to civil liability, colleges and universities face a myriad of other risks when they handle an acquaintance rape badly. These include, but are by no means limited to, adverse publicity, damage to institutional reputation[7], loss of enrollment, rise in the number of additional rapes on campus, loss of alumni contributions, and legal sanctions. Meanwhile, insurance companies have responded by increasing their premiums to cover the costs of lawsuits arising from rapes[8]. In fact, one university was told by its insurance company that litigation stemming from "illegal sexual activity" would no longer be covered by liability insurance; and some carriers are considering withdrawing from the college market, altogether[9].

Institutions of higher education should recognize that the reason acquaintance rape has become an epidemic among their student populations is due in large part to the lifestyles which flourish at

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7. At Colgate University, female students have been seen wearing T-shirts with the message,"Colgate University—The 4-Year Quest for the Sober Kiss." Robert Warshaw, *In the Bonds of Fraternity: Secrets of the Deke House*, THE NATION, Aug. 21, 1989, at 189, 207.

8. Mona Charen, *Feminists and the Increase in Date Rape*, NEWSDAY, Jan. 9, 1991, at 108.

9. William Celis 3d, *Students Trying to Draw Line Between Sex and an Assault, Agony on Campus: What is Rape?—A Special Report*, N.Y. TIMES, Jan. 2, 1991, at A1.

contemporary undergraduate institutions. This does not mean that colleges and universities are the sole cause of the problem, nor is it meant to imply that they condone the "environmental" factors that encourage acquaintance rape (e.g., ignorance as to when one's conduct actually becomes rape, the seriousness of potential sanctions, alcohol abuse and institutionalized gang behaviors). While not exclusively within the control of an institution, the presence of these factors must be admitted and addressed by college and university administrators, if for no other reason than to avoid tort liability for the consequences of a rape on campus. Similarly, institutions need to prepare themselves for the anguish of handling such a case. To try to muddle through the tragedy, publicity, emotion, and outcry which flow from an acquaintance rape case, without prior planning, is an invitation to disaster for any college or university.

Because there is no easy cure for the phenomenon of acquaintance rape, this monograph does not propose itself as anything more than a source of information concerning the wide range of issues which arise in acquaintance rape cases. The information is intended to provide a background for developing policies and procedures with which to respond to acquaintance rape on individual campuses.

The monograph will argue that a comprehensive institutional response to the campus acquaintance rape phenomenon must encompass at least three elements: Prevention, Risk Management, and Disciplinary Proceedings. Prevention is an institution's first line of defense against cases of acquaintance rape. Because acquaintance rape is almost always a one-on-one crime, one of the most effective ways to reduce its occurrence is to raise the awareness of potential victims and potential rapists.

For purposes of this monograph, Risk Management is the process of putting in place policies, procedures, and key personnel, in advance of the possible occurrence of an acquaintance rape on campus. Within this context, Risk Management is intended to help an institution organize its response to the consequences of the event so as to minimize its risk for any injuries emanating from the event.

Finally, an institution must have created appropriate Disciplinary Responses to a charge of rape. Because such proceedings can have far-reaching consequences, it is essential that they be structured to ensure fair treatment to both the victim and the accused. Utilizing the more traditional campus disciplinary proceedings in acquaintance rape cases—however well-intentioned—can entangle an institution and its administrators in criminal and civil proceedings in the courts for years.

In the discussion which follows, the monograph will focus on these three elements in turn and suggest how they can be integrated into a model for an institutional response to the acquaintance rape problem.

I. PREVENTION

Preventing acquaintance rape on a particular campus means reducing the environmental factors which encourage commission of the crime. The most effective way a college or university can achieve that goal is to do what it does best — educate. Campus rapes occur because of ignorance, on the part of both the victim and the accused, as to what actually constitutes rape. This ignorance can be substantially alleviated at little or no expense, simply by highlighting the problem and publishing a clear and concise definition of rape in the student handbook. In addition, institutions would be well-advised to sponsor on-going "educational exchanges," in which students discuss their varying perceptions of appropriate sexual behavior.

Another element of prevention is deterrence. The sanctions imposed against a student who commits a rape should certainly be as drastic as any that the institution otherwise imposes. The conditions under which such sanctions will be imposed should be stated clearly and unequivocally in the student disciplinary code. Penalties should be tough.

In the past, many students found guilty of rape were given light penalties, such as community service and counseling[10], with little follow-up to determine whether the sentence was carried out. A code of conduct stating explicitly that a sexual offense will result in expulsion sends the message that the behavior is not acceptable at that college[11]. An example of one such strong policy statement, from the University of California, Berkeley, is presented in Appendix Six.

The typical prevention program adopts two strategies: victim control and offender control. While this approach is appropriate as far as it goes, it is not enough. The problem with exclusive reliance on victim and offender strategies is that it presumes that sexual violence is an isolated, episodic phenomenon, when in fact, it appears

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10. Andrea Parrot, *Recommendations for College Policies and Procedures to Deal with Acquaintance Rape*, in Parrot and Bechhofer, ACQUAINTANCE RAPE: THE HIDDEN CRIME, at 368, 375.

11. It was observed at the University of Maryland that a highly proceduralistic code of conduct, coupled with an emphasis on "counseling" as the primary sanction for code violations and with amorphous catalog language, resulted in an atmosphere where students did not feel accountable for their actions. The catalog advised that "the goals of judicial actions are largely educative and preventive" and that campus disciplinarians will "meet the unique personal needs of student offenders." Gary Pavela, *Limiting the "Pursuit of Perfect Justice" on Campus: A Proposed Code of Student Conduct*, 6 J.C. & U.L. 137 (1979).

to be a social phenomenon, rooted in culture[12]. Victim control strategies for preventing acquaintance rape restrict the freedom and mobility of women, and, therefore, are not an acceptable cure-all[13]. Offender control strategies risk failure because of the serious gender-based differences in the perception of appropriate interpersonal conduct. To be effective, a prevention program must take a broader approach to the problems of sexism and violence toward women on campus, and seek to create an atmosphere of improved understanding and communication between men and women[14].

EDUCATION

As educational institutions, colleges and universities could be expected to have complete mastery of the techniques of effective communication with their students. It is something of an enigma, therefore, why these institutions persist in delivering messages about acquaintance rape in ways which do not communicate with the target population. Possibly, the problem is that faculty members rarely view this facet of education as an area in which they need to be involved. Blame may also be attributed to the increasing amount of information which a college must now communicate to its students. The size of registration packets has increased exponentially to the point where it is reasonable to suppose that students most often put the whole stack aside to be read "when there is time."

Finally, there is the problem of the audience. Educational strategies for preventing date rape need to consider the differences in an audience composed of victims, potential perpetrators and an otherwise passively participating community. The discussion of education which follows reviews the problem under three headings: the Medium, the Audience, and the Message.

The Medium—Publishing for Maximum Effect

During the past decade, faculty and administrators at institutions of higher education have spent many hours evaluating the ways in which college students learn most successfully and then training

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12. Mary P. Koss, *The Women's Mental Health Research Agenda: Violence Against Women*, 45 Am. Psychol. 374, 378 (1990).

13. Caroline H. Sparks & Bat-ami Bar On, A Social Change Approach to the Prevention of Sexual Violence Toward Women 3 (Wellesley College Stone Center for Developmental Services and Studies, Working Paper No. 6, 1985).

14. The Higher Education Amendments of 1992 authorized grants for "campus sexual offenses education." Should appropriations be forthcoming, an eligible institution could receive grants for training of personnel to deal with rape, development of policies and programs, support services, victims assistance, and rape education and prevention programs. 20 U.S.C.A. § 1145h (West Supp. 1993).

their faculties to teach accordingly. For an even longer period, American corporations and their advertising agencies have spent millions of dollars researching how best to motivate students to buy their products. By contrast, little effort seems to have been devoted toward harnessing the strategies of teaching and marketing to the task of communicating information about appropriate student behavior.

Effective presentation of information to college students requires substantial skill. Anyone can design and distribute a list of things to do to avoid unwanted confrontation, for example, but that alone may not be enough to motivate students to alter their habits or behavior. To actually reach the students and persuade them to conduct themselves otherwise, the message has to be presented in a way which first captures their attention and then persuades them to act.

Careful thought as to the effectiveness of various types of presentation is essential. The most powerful message, if presented in a way that its targets will ignore, fails completely. It is important, therefore, to consider the media through which the presentation will be made, as well as the timing of the presentation. While it is beyond the scope of this monograph to evaluate the various media which are available, a college that wishes to use prevention/education as a principal strategy to avoid campus acquaintance rape will expend real effort in designing the way in which its message is presented.

As a point of reference for a discussion of the type of media to be utilized, institutions have experimented with various ways to present the issues of acquaintance rape. To convey the message vividly, many schools make use of videotapes portraying acquaintance rape scenarios, containing interviews with victims, or both. Such videotapes have been found useful in stimulating discussion and reflection about personal attitudes, blind spots and the sort of community that students and administrators hope to build on campus. Some of the available videos are listed in Appendix One[15].

As public awareness of campus acquaintance rape issues has grown in recent years, there are an increasing number of readily available resources on the subject. In addition to videotapes there are numerous high-quality informational pamphlets and booklets. Some of these are also listed in Appendix One, along with various organizations that provide resources. If a college or university is not in a position to produce its own informational materials, it should certain-

15. Michigan State University has tried another creative solution to this problem by staging a "mock trial" in a dormitory. Student volunteers played the roles of victim and accused, with the other roles played by a judge, a prosecutor, and a defense attorney. JULIE K. EBERHART & BERNICE R. SANDLER, CAMPUS GANG RAPE: PARTY GAMES? 14 (Center for Women Policy Studies, 1985).

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ly review existing materials for distribution to students as part of an overall awareness and prevention program.

While a full exposition of acquaintance rape policies and protocols in the student handbook is essential from both a practical and a legal perspective, few students are likely to actually read them if they are buried in a catalog or thick handbook. A supplementary communication from the vice president for student affairs, on the other hand, may attract wider readership, especially if it is received separately from the packet of general information handed out at orientation. Another option is to include information on acquaintance rape in such federally-mandated annual publications as the "Drug-Free Schools and Campuses" pamphlet and the "Student Right-to-Know and Campus Crime Awareness" report. Not only would this be a cost effective way to convey an important message, but the occurrence of acquaintance rape is very much tied into each of these issues and therefore makes for a logical relationship.

To deliver the message, then, institutions should combine informational materials, such as pamphlets and videos, with structured discussions and workshops, perhaps in conjunction with local rape crisis centers. Consideration should be given to making attendance at such events mandatory, particularly because the education process is aimed in part at reaching potential perpetrators.

The timing of presentations and discussions is as important as the medium through which they are delivered. Many institutions offer programs on acquaintance rape only during "orientation week" in an effort to sensitize students early. However well-intended this timing is meant to be, much of the impact may be lost because incoming students tend to be overloaded with other information during this time.

An acquaintance rape awareness program can only succeed if it surmounts this drown-out. The message cannot be just another pamphlet in the packet, or another speech to students eager to discover the campus. Nevertheless, at many colleges, an acquaintance rape program during orientation week is the only such contact attempted. Not surprisingly, this is a strategy that has not proven to be very effective in preventing future occurences.

While women are most at risk during their freshman year, they can become victims at any time during their college career. Similarly, limiting educational programs for men to orientation week suffers from both the problem of orientation overload and the risk of not getting the message to them in their upper class years, when they are most likely to become perpetrators. For all these reasons it is worth

designing an educational process that continues to reach students throughout their college experience. Another way of achieving this goal is to allot a day, or a week, each year as an acquaintance rape awareness day, or week, in addition to sponsoring an acquaintance rape program during orientation week. Such an event might be particularly effective if it were conducted just before a high alcohol consumption period, such as homecoming or spring break.

The Audience

Single-Sex and Co-ed Discussion Groups. An effective rape prevention program includes both single-sex and co-ed workshops. Programs tailored specifically for women provide them with an opportunity to voice concerns and ask questions without feeling inhibited by the presence of men. They can also serve as a forum for warning women to avoid those situations that often lead to acquaintance rape. One of the problems with female-only workshops, however, is that they may reinforce the stereotype that women alone are responsible for preventing acquaintance rape.

As such, men should also have an opportunity to discuss ways of dealing with acquaintance rape in a single-sex environment. Efforts to educate men and to change their attitudes and behavior may likewise be more effective in all-male groups. Such programs would provide them with a comfortable environment in which to discuss their concerns openly and to recognized characteristics that make them potential perpetrators, without being inhibited by the presence of women.

While single-sex workshops are conducive to open and candid conversation, it is also important to offer compatible co-ed workshops with a special emphasis on encouraging clear and frank communication between young men and women. This is particularly important because acquaintance rape is often the consequence of miscommunication.

Freshman Women

Because acquaintance rape victims are most likely to be a freshman female, newly arrived on campus, this group should be one of the primary targets of educational efforts[16]. The initial period of

16. Marta Aizenman & Georgette Kelley, *The Incidence of Violence and Acquaintance Rape in Dating Relationships Among College Men and Women*, 29 J. C. Student Dev. 305, 307 (1988). The study reports that the second most vulnerable group is high school seniors. The authors conclude that "immaturity can be considered as a factor contributing to poor communication and coping skills in relationships," and that many young people suffer "from a lack of good communication in the area of sexuality and a lack of confidence in asserting their sexual rights and needs." *Id.* at 309.

adjustment to independence and to the freedom of campus life is often a turbulent transition for women, one that results in their being particularly vulnerable to acquaintance rape. For many of these women, this is their first time living away from home and they may simply lack some of the necessary skills to manage new situations and new freedoms.

In addition, it is natural for these women to test the limits of their newfound independence, and sometimes make errors of judgement[17]. They are thus thrown into unfamiliar social and emotional experiences at a time when they are feeling particularly brave and invulnerable. The challenge is to cut through the "noise" of these initial experiences and deliver a cautionary message to a group which is disinclined to believe that anything bad could soon happen in their lives.

Campus Men

Colleges and universities frequently make the mistake of tailoring an acquaintance rape information program exclusively to female victims. While the needs of female victims, both actual and potential, must undeniably be addressed, to focus a program exclusively on them is to accept the occurrence of acquaintance rape as a fact of life. It is important to keep in mind that acquaintance rape is a man's issue as well as a woman's. Men who are found guilty of acquaintance rape may suffer severe consequences, including expulsion from school, imprisonment or destruction of reputation. It is just as likely that a male guilty of a sexual assault will appear perfectly "normal" as it is that he will have overt symptoms of psychological disturbance[18]. This suggests that the etiology of acquaintance rape may well be in the way males are socialized in the current American culture, which seems to overemphasize the importance of males appearing powerful and aggressive.

An educational campaign should therefore focus equally on men and women and, as was the case with the most likely victims, address those who are most at risk of becoming perpetrators. A recent study of the literature suggests that some characteristics may be predisposing factors for sexual aggression[19]. Qualities often associated with sexual aggression include irresponsibility, lack of social conscience, values legitimizing aggression towards women, and a desire for domi-

17. Laurie Neff, *Acquaintance Rape on Campus: The Problem, the Victims, and Prevention*, 25 NASPA J. 146, 147–48 (1988).

18. Alan Berkowitz, PhD, *College Men as Perpetrators of Acquaintance Rape and Sexual Assault: A Review of Recent Research*, JOURNAL OF COLLEGE HEALTH, Vol. 40, 178 (January 1992).

19. *Id.*

nance over sexual partners. To the extent that these factors can be used to identify a group of male students, they can also help a college focus its educational efforts and enhance the effectiveness of its prevention program.

An additional benefit of focusing on men's behavior is that campus men are in a unique position to prevent acquaintance rape by recognizing in themselves as well as in others inappropriate sexual conduct, and interceding to prevent a sexual assault. Drawing attention to distinctive perpetrator characteristics can help men examine their own attitudes and address those potentially dangerous aspects of their personality.

Rape educators have found that it is difficult to involve men in large numbers in effective discussions of rape issues[20]. It may be helpful, therefore, to enlist male campus leaders—administrators, professors, coaches, captains of athletic teams—to participate in small group awareness efforts[21] or to experiment with at least some single-sex education efforts, such as workshops and discussion groups.

Fraternities and Teams

A particular danger is posed by groups of "associated males" or "cohesive groups": mainly fraternities and athletes. Experience has shown that a disproportionate number of acquaintance rapes on campus[22] are committed by men from these "elite" groups.

Fraternities pose an especially worrisome presence[23]. Fraternity members should be put on notice that female students are to be treated respectfully, and that any proven allegations of non-consensual sex on fraternity grounds, during or after a fraternity party, or by a fraternity member will result in harsh disciplinary action. The threat of dissociation will in many cases motivate national fraternity organizations to police their affiliates. In one example, a national

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20. Neff, *Acquaintance Rape on Campus: The Problem, the Victims, and Prevention*, at 150.

21. *Id.*

22. In a recent 10-year period, there were 24 documented cases of alleged campus gang rape. Thirteen of these were committed by fraternity men and nine by groups of athletes. Studies also show that men from these groups are much more likely to be sexually aggressive individually than non-affiliated college men or those from other organizations, such as student government. Chris S. O'Sullivan, *Acquaintance Gang Rape on Campus*, *in* Parrot & Bechhofer, Acquaintance Rape: The Hidden Crime, at 144-45.

23. There are several reasons for this: "the sheer number of men who join them (far greater than the number who belong to athletic teams); because they are socially approved and even admired groups (as opposed to gangs); and because members must show unquestioning loyalty (unlike casual friends)." Robin Warshaw, *In the Hands of Fraternity Secrets of Deke House*, The Nation, August 21, 1989, at 189. One institution found that fraternity members on its campus were more than twice as likely to commit rape than were their classmates. Study, University of Illinois at Urbana Champaign, *cited in* Kathleen Hirsch, *Fraternities of Fear: Gang Rape, Male Bonding, and the Silencing of Women*, Ms., September/October 1990, at 52.

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fraternity, Pi Kappa Phi, created and distributed anti-rape posters to each of its fraternity houses[24].

The institutional code of conduct should state clearly that, where a fraternity is legally implicated in an acquaintance rape, members of that organization will be punished and the organization will be fined, suspended, or eliminated. In fact, colleges should review their fraternity system and structure to assure accountability, policing, and some mechanism for awareness training. As demonstrated by both Colby College and Amherst College in 1984[25], it is entirely possible to eliminate especially intransigent on-campus fraternities.

A useful approach for dealing with groups of associated males can be taken from the way the NCAA directs coaches to deal with drugs and gambling. Coaches are required to hold compulsory meetings at which players are warned against drug use and gambling in the strongest terms, and informed that participation on the team is a privilege that will be jeopardized by misconduct. Coaches appear to take this obligation very seriously, often bringing in FBI and police officials to hammer the message home. A similar stance could also be taken to prevent acquaintance rape. A gang rape by college athletes is even more destructive of an institutional image than the conviction of athletes for point shaving or drug use, and the evidence of recent years suggests that the risk of such a rape is higher than that of gambling by college athletes. In their own self interest, coaches should be directed to convene a team meeting to warn players that sexual assault will not be tolerated, allegations will be taken seriously, and a violation will result in dismissal from the team.

The Message

Defining Rape

Few educational institutions currently have formal policies or procedures that deal effectively with acquaintance rapes or, more generally, with sexual assaults[26]. Absence of an acquaintance rape policy in today's litigious climate is extremely risky.

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24. The poster showed a portion of "The Rape of the Sabine Women" and underneath it the words "Today's Greeks Call It Date Rape" and in smaller print: "Just a reminder from Pi Kappa Phi. Against her will is against the law." *Fraternity Poster Warns Against Date Rape*, On Campus with Women (Project on the Status and Education of Women), Winter 1987, at 7.

25. Ehrhart & Sandler, Campus Gang Rape: Party Games?, at 20, n.26.

26. Finding of the California Legislature, Assembly Bill No. 3098, § 1(a)(1) (1990) (codified at Cal. Educ. Code §§ 67385-67386 (West Supp. 1993); Aileen Adams & Gail Abarbanel, Sexual Assault on Campus: What Colleges Can Do (Santa Monica Hospital Medical Center Rape Treatment Center) 17 (1988).

The first purpose of an acquaintance rape policy is to provide a definition that is as clear and as understandable as possible[27]. Students are often totally misguided in their perceptions of what constitutes rape. This error is compounded further by many college codes, in which rape is subsumed under "sexual harassment," or left to a general prohibition, for example, against "physical abuse, threats of violence or conduct that threatens the health and safety of any person."[28]

The definition of acquaintance rape should avoid watered-down language. Euphemisms for rape such as "advance without sanction" create "wink-and-a-nod" categories of lesser offenses, without any explanation or justification. A charge of rape is a very serious allegation, even in the context of a nonjudicial process such as a campus administrative hearing. The wording in a college code of conduct, therefore, should reflect the same precision normally associated with a criminal statute. The offense should be spelled out, the standard of proof should be disclosed, and appropriate penalties should be set forth. State criminal codes and the uniform crime reporting systems are good sources.

In addition to striving for clear, concise language, a disciplinary code can achieve greater impact by using illustrative hypotheticals, such as those described below. The application of a disciplinary rule to concrete facts can make a far greater impression on a student's mind than concepts in the detached context of a code of conduct. By using memorable vignettes, the definition hypotheticals can show students how to apply abstract principles, such as force and consent, to real-life situations in which they may find themselves.

Illustrative Hypothetical Situations

Example One: Peter and Sue are at a party and Sue becomes very drunk. They go back to Sue's room. Sue passes out. Peter has sex with her. Is this rape?

Analysis: Because Sue is unconscious, she is unable to consent to having sex with Peter. When a man has sex with a woman who is incapable of giving consent, it is rape. A woman who is so drunk she does not comprehend what is happening cannot give consent.

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27. Admittedly the creation of a simple definition of rape is difficult because the existing statutory definitions of this crime are by no means uniform. The most modern statutes refer to rape as sexual assault as that term is defined in State of New Jersey in the Interest of M.T.S., 609 A.2d 1266, 1276 (N.J. 1992), while the more traditional statutes excuse from conviction even unwanted penetration in the absence of protest. We believe the better approach to be to define rape as any sexual touching or penetration which occurs without the recipient first having made some affirmative expression of consent, either orally or by actions that a reasonable person would interpret as consent in light of the surrounding circumstances.

28. Adams & Abarbanel, SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES CAN DO at 19 (quoting the University of California, Berkeley, Code of Student Conduct).

Example Two: Peter and Sue are at a party and Peter becomes very drunk. They go back to Sue's room. Peter makes sexual advances and Sue protests. Peter is drunk and feels that he cannot control his desires. He ignores her resistance and has sex with her. Is this rape?

Analysis: Rape does not depend on the man's state of mind. It depends on what is objectively reasonable in the situation. Peter's incapacity or insensitivity due to drinking is not an excuse for forcing another person to have sex. Drunk or not, it is rape.

Example Three: Peter and Sue have been involved in a sexual relationship for several months. Sue decides to end the relationship and goes to Peter's room to tell him. When she tries to tell Peter, he embraces her. She protests and resists, but he forces her on the bed and has sex with her. Is it rape?

Analysis: Forced sex without a partner's consent is rape, regardless of any preexisting relationship between two people.

Example Four: Peter and Sue are alone. Peter kisses Sue and makes other sexual advances. Sue goes along with it by removing Peter's shorts. She doesn't want to have sex with him but she is not comfortable telling him. Peter thinks Sue is willing to have sex because she does not protest or resist. He has sex with her but the whole time she is thinking that she does not want to be having sex. Is it rape?

Analysis: In this situation it appears objectively that Sue has consented to having sex. Although she has not orally granted Peter permission to proceed, her act of removing his shorts would likely be considered consent by a reasonable person. The alleged victim's subjective state of mind is not relevant to the offense if she does not otherwise communicate her feelings or if she acts in a manner that can reasonably be interpreted as consent in light of the surrounding circumstances[29]. As always, if threat or intimidation were present in the situation then Peter would have reason to believe that Sue's cooperation was not voluntary. Absent such circumstances, if Sue is responsive to Peter's advances and does not communicate her unwillingness, it is not rape.

Example Five: Peter and Sue leave a party together. Peter walks Sue back to her room. While alone with Sue in her room, Peter kisses

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29. See State of New Jersey in the Interest of M.T.S., 609 A.2d at 1277, 1279.

Sue and makes other sexual advances. Sue doesn't like Peter and doesn't want to have sex with him. Peter thinks Sue is willing to have sex because she does not protest or resist. He has sex with her. Is it rape?

Analysis: This is a situation in which the law is changing. In New Jersey, for example, a state that has adopted more current acquaintance rape laws, Peter would be guilty of rape because he had no reasonable basis to believe Sue had consented[30]*. While this situation may seem ambiguous, she did not make any statements or gestures that Peter could reasonably have interpreted as an affirmative expression of consent. Lack of objection by a woman is not evidence of consent, and consent is essential because sex without it is rape. However, in other states which adhere to the older law, Sue's failure to object would be evidence of consent. In those states, Peter would not be considered a rapist.*

Statutorily Mandated Elements of an Acquaintance Rape Policy

Participation in federal student assistance programs now hinges on a university's compliance with the Crime Awareness and Campus Security Act[31]. This law requires that an institution maintain statistics on violent crimes, including rape, reported to "campus security authorities" or to the local police[32]. The institution must also "make timely reports to the campus community" when a listed crime occurs on campus and a recurrence threatens the community[33]. As of September, 1993 the institution must also have promulgated a set of policies mandated by the Campus Sexual Assault Victim's Bill of Rights. See page 22.

ENFORCEMENT

Internal or External Enforcement

Some universities have determined (or are tempted to proclaim) that investigating charges of rape, and/or conducting proceedings involving students charged with acquaintance rape, are best left to municipal police and government prosecutors. However, for a number of reasons, this approach is not necessarily the best one to take, nor can the problem of acquaintance rape always be dealt with quite so easily. Acquaintance rape is a type of crime which is inherently

30. *Id.* at 1279.

31. 20 U.S.C.A. § 1092(f) (West Supp. 1993).

32. 20 U.S.C.A. § 1092(f)(1)(F) (West Supp. 1993).

33. 20 U.S.C.A. § 1092(f)(3) (West Supp. 1993).

hard to prove. In most instances, the only witnesses are the victim and the defendant; and there is usually little, if any, corroborative evidence to add weight to the victim's testimony. Add to this the likelihood that the victim's credibility will be adversely affected by the fact that she may have to admit that she was drunk, and it is not hard to understand why, at least until recently, acquaintance rape cases were not apt to be pressed very aggressively by district attorneys[34].

As a practical matter, therefore, leaving all cases of campus acquaintance rape to external authorities will almost ensure that such cases will not be prosecuted, or even investigated, aggressively. This means that a university choosing the external route will have to cope with the coexistence of defendants and their accusers (not to mention outraged groups fearful of additional rapes and demanding immediate action) for long periods of time while the state authorities proceed with all deliberate speed.

Long before there is a resolution in the criminal courts, the situation on campus is likely to become intolerable to all involved, thereby engendering another reason why exclusive reliance on external authorities is short-sighted. The frustrations encountered by the victim and other campus women who, reasonably enough, feel threatened when there is no action taken on an acquaintance rape case, almost inevitably lead to lawsuits against the institution, which is the only "sue-able" entity available in the "external" scenario. An institution weighing the external route might well consider whether the ability to proceed at a self-determined speed to investigate and resolve a charge of acquaintance rape does not, in fact, counteract the horribles anticipated in undertaking acquaintance rape cases internally.

Jurisdictional Limits

Consider the following scenarios: The Pimento College acquaintance rape task force is trying to decide how much jurisdiction to assert in an updated version of its disciplinary code. The task force considers the following situations. (1) A Pimento student reports that she has just been raped by another Pimento student in on-campus housing. (2) A Pimento student reports that she has just been raped by another Pimento student off-campus, at her apartment in town. (3) A Pimento student reports that she has just been raped by another

34. At the University of Southern California, for example, of 11 rape or attempted rape cases adjudicated by the hearing board since 1984, all were reported to the police and all were rejected for prosecution by the district attorney's office. University of Southern California, External Review Committee, *An Evaluation of the University of Southern California's Sexual Assault Policies, Procedures, and Programs* (review draft) 37 (April 1992) (on file with the author).

Pimento student while they were vacationing together in a distant state. (4) A Pimento student goes to a party at a nearby women's college and rapes a student there. (5) A woman comes to a party at Pimento and is raped by a Pimento student. (6) The Pimento administration is informed that a Pimento student on spring break in Florida raped a vacationing student. (7) A Pimento sophomore alleges that she was raped six months earlier by a Pimento student, who has now graduated. (8) A Pimento student alleges that she was raped by another Pimento student two years earlier. Both are still students. The task force wonders how much jurisdiction it ought to assert, and what principles it should use in reaching a decision.

The goal for a college is to take a responsible and appropriate approach to jurisdiction. Some colleges would only become involved in a recent, on-campus incident, as in situation (1). Others have experimented with "long-arm" jurisdiction that would encompass most or all of the above situations. If the jurisdiction is too narrow, the college risks giving the impression that it does not take acquaintance rape seriously and will avoid becoming involved wherever possible.

Since many acquaintance rapes occur off campus, but in the student residence neighborhood, a college that is serious about preventing acquaintance rape ought not to limit its disciplinary reach exclusively to on-campus incidents. By contrast, if the jurisdiction is too broad, investigation of an incident can become difficult and costly: in examples (3) or (6), for instance, does the college send an investigator to question witnesses in a distant state?

A college should not refuse to pursue a case solely on the grounds that it happened too long ago. To insist, for example, on a six-month statute of limitations is to ignore the reality that it often takes time for a rape victim to marshall the inner resources to report the incident to the authorities, and to face the ordeal of an investigation and possible confrontation with her assailant or his friends. Acquaintance rape, like stranger rape, is a drastically under-reported crime[35]. However,

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35. In a study of 2,400 Stanford students, one in three women reported being forced or pressured to have sex when they did not want to. Ninety-eight percent of these incidents occurred between acquaintances. Only 2% of the incidents that occurred at Stanford (39% of all incidents reported in the survey) were reported to the police. Only 17% of the victims ever told anyone (other than this anonymous survey) of their incidents. Stanford University, *Final Report of the Task Force on Sexual Assault*, at 2 (1990). According to another source, only one in ten campus rape victims reports her rape to the administration. Deirdre Carmody, *Increasing Rapes on Campus Spur Colleges to Fight Back*, N.Y. TIMES, Jan. 1, 1989, at A1, A12. Reasons cited for under-reporting of rape include acceptance by women of violence in social settings and fear of retaliation. Sherry K. Lynch, *Counseling Date Rape Survivors: Implications for College Student Personnel Professionals*, Paper presented at the American College Personnel Association Annual Meeting (March 24–27, 1985). The National Victim Center found in its 1992 study that only 16% of rape victims reported the crime. Donna Halvorsen, *Crime Bill Tries To Address Rape Problem*, STAR TRIBUNE (Minneapolis/St. Paul), April 25, 1992, at 1B, 2B.

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as long as the code of conduct clearly delineates the institution's jurisdictional reach in terms of parties involved, elapsed time, and location of the rape, no sound objection can be raised to the notice or fairness of those limits.

When the accused student has already graduated, it is probably best for the college not to involve itself except by cooperating with any investigation by the police. The assailant is gone and no longer presents a threat to the campus community. Degree revocation, the only remedy then available to the college, is likely to result in different legal battles. On the other hand, for those situations in which an accused upperclassman uses procedural maneuvering to delay his administrative hearing beyond his graduation date, graduates, and then claims mootness, an institution can have a policy against conferring a degree on a student who has serious disciplinary charges pending against him.

Alcohol

The university message on acquaintance rape should underscore the role that alcohol plays in a large percentage of acquaintance rape incidents[36]. Indeed, education about alcohol should be an essential part of an acquaintance rape prevention effort[37]. Real enforcement of a responsible campus alcohol policy would also seem to be a productive strategy in reducing the occurrence of acquaintance rape. However, to be effective, enforcement must be gender neutral.

Unfortunately, when the parties involved in an acquaintance rape have been drinking alcohol a double standard all too often works to the male perpetrator's advantage, while it is deleterious to the female victim's case[38]. Offenders are allowed to claim they were not responsible for their actions because they were drunk. However, female victims who also may have been drinking are often perceived as being less credible, overly sexual and reckless. Where it exists, such a

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36. The high correlation between alcohol consumption and acquaintance rape is explored in Antonia Abbey, *Acquaintance Rape and Alcohol Consumption on College Campuses: How Are They Linked?*, 39 J. Am. C. Health 165 (1991). The author suggests that drinking by either the perpetrator or the victim can exacerbate the problem. Alcohol use leading to acquaintance rape is one reason for another study's conclusion that a comprehensive approach—including education, treatment, and environment—is necessary for dealing with alcohol issues on college campuses. Donna Spitzhoff, *Women, Alcohol, and the College Campus*, Paper presented at the 70th Annual Conference of the National Association for Women Deans, Administrators, and Counselors (March 19–22, 1986). *See also* Aizenman & Kelley, *The Incidence of Violence and Acquaintance Rape in Dating Relationships Among College Women and Men*, at 309–10.

37. For a discussion of the role of alcohol education in preventing acquaintance rape, see Andrea Parrot, *Institutional Response: How Can Acquaintance Rape Be Prevented?*, in Parrot & Bechhofer, Acquaintance Rape: The Hidden Crime, at 355.

38. Dennis Benson, Catherine Charlton, and Fern Goodhart, *Acquaintance Rape on Campus: A Literature Review*, 40 J. Am. Coll. Health 160 (1992).

double standard eliminates the utility of rules on the use of alcohol, and may actually increase the likelihood of acquaintance rape.

Because of the high proportion of acquaintance rape incidents that involve alcohol or drug use, the acquaintance rape policy should recognize alcohol's contributory role, and state that intoxication is not a charter for lawlessness. Correspondingly, the alcohol policy should reiterate this position, and include acquaintance rape among the reasons that violations of the alcohol code are damaging to the campus community, and will not be tolerated. To follow up, of course, these policies should be enforced as written.

Campus Parties

As an adjunct to its alcohol policy, a college should review its policy on campus parties, which are a contributing factor in many acquaintance rape incidents, especially those involving male groups. The principal dilemma in this area is how to achieve adequate supervision. Often this boils down to whether or not to require that campus parties be registered in advance.

The advantage of requiring registration is that it is easier to allocate supervision if the administration knows where the parties are. It is also a visible means by which a college can demonstrate its responsibility in monitoring a potential campus danger and, therefore, plausibly disclaim responsibility when problems occur because of an unregistered party. The disadvantages of registering parties, however, include a strengthened predicate for the institution's liability when problems occur at a party that is registered, the administrative difficulty of physically monitoring all the registered parties on any given night, and the possibility that party activity will be driven underground as students attempt to sidestep the registration system, thereby making it even harder for the administration to monitor these social events.

If the university decides that all campus parties should be registered, an official monitor should be sent to all campus parties. Otherwise, it will appear that the university undertook to supervise and discipline party activity, but was inconsistent or negligent in following through. If registration is not required, then parties should be subject to routine random visitation by campus officials and firm enforcement of campus rules when infractions are found. Otherwise, it will similarly appear that the school is ignoring an obvious hazard.

Victim Rights and Privileges Statement

The Higher Education Amendments of 1992[39] include the Campus Assault Victims Bill of Rights, pursuant to which colleges and universities wishing to receive any sort of federal funding must promulgate a statement of a rape victim's rights and privileges. Therefore, effective September 1993, colleges must have, at a minimum, a policy or policies addressing the following issues:

i. Sexual assault prevention.
ii. Sanctions to be imposed for sexual assault[40].
iii. Procedures to be followed in reporting a sexual assault, preserving evidence and obtaining assistance for the victim.
iv. Disciplinary procedures for sexual assault cases which provide at least the following:
    a. the right of the accuser and the accused to have the same type of representation at any hearings.
    b. the right of the accuser and the accused to be informed of all outcomes of the proceedings.
v. Assurance that student victims are fully informed of their right to file charges with campus and municipal law enforcement authorities and affording them institutional assistance in notifying the authorities of their charges.
vi. Assurance that all students are aware of the counseling, mental health, and student services resources available on campus and in the community.
vii. Informing students that academic and living arrangements can be changed at the request of a sexual assault victim, provided that such changes are reasonably available.

The Campus Assault Victim's Bill of Rights makes compulsory what many commentators have viewed as essential common sense[41]. For most institutions, all that remains to be decided is how to flesh out the federal requirements.

Adoption of a victim's bill of rights is both socially responsible and pragmatically sensible for an institution that wishes to avoid liability for future victims. Compliance with all of the "rights" required in the federal law should reduce the risk that a victim will sue the institu-

39. 20 U.S.C.A. § 1092(f) (West Supp. 1993).

40. The Act also requires institutions to recognize that sexual assault can include a variety of offenses by listing "rape, acquaintance rape, or other sex offenses, forcible or nonforcible." This would appear to be a cross reference to the revised definition of the sex crimes reported in the Uniform Crime Reporting System. 20 U.S.C.A. § 1092(f)(7)(B)(ii) (West Supp. 1993).

41. See Adams & Abarbanel, SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES CAN DO, at 21–22.

tion. Most of these rights are, in fact, nothing more than what any compassionate institution would otherwise provide to a member of its community who was the victim of a violent crime.

II. RISK MANAGEMENT

Even the most effective campus prevention program cannot actually eliminate acquaintance rape. Indeed, it is a given that every campus will have to deal with a case (and, probably, sooner rather than later.) It is, therefore, essential to plan the steps the university will take in managing the consequences of an acquaintance rape. Failure to do anything less is an invitation to a nightmare. By preparing a plan, rehearsing its application realistically and following it carefully, a college or university can reduce the risk that it will be blamed for the crime.

Training Programs

All personnel who are likely to receive initial reports of an acquaintance rape, or to interact with victims, should receive training in how to give an effective and caring response. Training programs should cover such essential topics as telephone screening and referral procedures, sensitivity training, written procedures to be followed, confidentiality, evidentiary concerns, and crisis intervention[42]. Rape crisis centers can help craft appropriate training programs.

Because a Residence Advisor (RA) is often both the first college representative contacted by a woman who has been raped and the least experienced member of the college team, it is especially important that RA's receive training in rape case protocol, including questions to ask a rape victim, confidentiality, and mandatory reporting. The key fact to be conveyed, however, is that the RA should use all her abilities to persuade the victim to talk to a rape crisis professional as soon as possible. The RA needs to understand that, no matter how composed she may appear to be, the victim is dangerously at risk and needs the skills of a professional. No matter how determined the victim is to reject this advice, the RA needs to be trained to persist in the effort to bring in a professional. Appendix Five, "Helping the Victim," offers a checklist of the skills required to assist a woman in the traumatic aftermath of rape.

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42. Stanford University, *Final Report of the Task Force on Sexual Assault*, at 13.

Reporting Procedures

One of the most complex problems for an institution responding to the acquaintance rape phenomenon is designing effective procedures for reporting incidents of the crime. The problem stems from the degree to which acquaintance rape goes unreported and/or to which its victims do not seek redress. It is just as likely for administrators to have information that a rape has occurred, but to be unable to report it without violating the victim's wishes, as it is for the victim to report the offense herself.

Such complexities are only the beginning of the institution's difficulties. The state and federal crime reporting statutes mandate that the institution treat as "reported" any rape about which RA's, residence staff and student deans have been informed, apparently without regard for the victim's wishes. If this regulatory mandate is in fact sustained, it will be necessary to create new relationships between student affairs staffs and the central administration in which the advisor/student bond is explicitly made subject to the government reporting obligation. While this may be good criminology, it is not very practical college administration.

Even assuming that good sense will win out in the end, administrators should examine their staff manuals and institutional procedures to be sure that they explain clearly and carefully what is involved in reporting a rape. Until recently, it was unlikely that student affairs staffs received any training in this area; it is now essential.

While the sources are sometimes unusual, the ways in which a college administrator learns about an acquaintance rape are fairly predictable. Some channels are "open," and permit the institution to bring its full resources to bear on all aspects of the event. Other channels are more aptly described as "closed," and compel the institution to limit its response to what the victim is prepared to permit. Procedures need to be developed for both channels.

When a victim presents herself to the infirmary, a rape crisis center, or the campus police and expresses a wish to proceed with a complaint, either criminal or internal, there is no doubt that a rape has been "reported," and so, the reporting channel is "open." On the other hand, when a distraught young woman tells a Resident Assistant that her roommate has been crying for two days and she thinks it must be because the roommate was raped at a fraternity party she attended, the channel is "closed." In the first instance, the incident should be entered on the police log and the process of responding to the complaint begun. The second set of facts will require a more elaborate procedure.

The RA should be trained to report the roommate's story to a university rape services advisor (if there is one) or to a counsellor, rather than trying to investigate the matter independently. The professional to whom the RA reports should be required to file a "potential incident report," without naming the reported victim or the source. Subsequent reporting will depend on the facts as they are developed by the professional and the wishes of the victim as they are expressed to the professional. If the professional ultimately determines that no rape has taken place, the potential incident report will be reported as "unfounded." If a rape has occurred, and the victim is prepared to file a complaint, a full report is filed. However, if a rape has occurred, but the victim does not wish to disclose it, the potential incident report becomes a record which can be used for institutional memory purposes.

Written Protocol

A swift, coordinated response by university representatives is critical to risk management in the aftermath of a campus rape. If the reported rape has occurred recently, evidence must be collected promptly, or it will become useless. The victim will need immediate medical attention[43] and perhaps rapid psychological intervention, as well. Her safety may be at risk if she is left exposed to a repeated attack. Finally, others close to her, such as roommates, may be traumatized and may also need assistance.

Delay, then, is not acceptable, nor is passing the buck from one administrator to another in the hope that someone available will have a clear idea of what should be done. The immediate aftermath of a rape is not the time for improvisation. It is essential that a college have a written protocol in place to guide its administrators in their response to a reported rape[44].

Aside from being good risk management practice, implementation of protocol for insuring adequate victim treatment and information practice is required of institutions of higher education by law in some states, notably California[45]. Implementation of these recommendations will help colleges to comply with such legislation. A sample protocol is reproduced as Appendix Three.

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43. For a discussion of the physical and psychological harm suffered by rape victims, see Terry Nicole Steinberg, *Rape on College Campuses: Reform Through Title IX*, 18 J.C. & U.L. 39, 44-47 (1991).

44. The contents of such a protocol are discussed at p. 41 et seq.

45. Cal. Educ. Code § 94385 (West Supp. 1993). The law requires that each private postsecondary educational institution in the state establish a written procedure or protocols containing information on the college's sexual assault policy, notification of personnel, legal reporting requirements, victim services and resources, procedures for ongoing case management, confidentiality, press handling, and victim options including filing criminal charges and moving to alternative housing. A separate law imposes a substantially similar requirement on public colleges. Cal. Educ. Code § 67385 (West Supp. 1993).

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The protocol should cover several topics. First, it should ensure that the victim receives immediate medical care, even if it is not always evident that such care is needed. Second, where the victim needs help immediately, the protocol should recommend contacting a local rape crisis center or hospital emergency room. Third, the collection of evidence should be addressed immediately, which will require a referral to a previously-identified hospital with a qualified rape crisis center as part of its emergency facilities. Finally, the victim needs to be informed of her options, which should include contacting some or all of the following: an independent rape crisis organization, the campus rape crisis coordinator, health services, the psychological counseling center, the local police, a college administrator (who can help with extending academic deadlines, changing living situations, etc.), the disciplinary board, her family, a friend, or a religious leader.

The university's policy concerning confidentiality and the applicability of state rape shield laws should also be explained to the victim. Confidentiality for the accused should be ensured.

When To Involve the Police

It is never advisable for a university to agree to exclude the police from a case involving violence, nor proper to attempt to convince a victim not to approach the police. A college is likely to find itself out of its depth in investigating a major crime such as rape. Where a rapist is violent and/or there is a risk of recurrence, all but the largest university police forces will need to turn the case over to municipal authorities. However, this will have to be done in consultation with the victim. When cooperating with municipal or state police, a university must make the results of any internal investigation freely available.

Roommates

Rape victims are traumatized by what has happened to them and the first priority is their care and support. What is sometimes overlooked is that roommates of victims can also be deeply affected by these incidents. Where a rape victim indicates that she has discussed the event with her roommates or friends, support and counseling should also be offered to them where appropriate.

Press Statements

While a university may wish initially to keep an acquaintance rape incident quiet, thereby avoiding adverse publicity, the better choice is managed publicity. Where an institution attempts to wrap a curtain

of secrecy around a rape incident, the fallout for victim, accused, campus community, and institutional reputation may well be far more negative than if the school had taken an open approach. This happened after an acquaintance gang rape incident at one Ivy League college. Later, its president acknowledged that "the university's policy of almost total secrecy about the gang rape led to rumors and gossip that repeatedly swept the campus, worsening an already distressing situation for all the individuals involved and for the university as a whole."[46]

When an incident occurs, it is best to let "facts supplant rumors and myths" by publishing information, without violating student privacy[47]. When and where did the incident occur? On campus? Was the rape committed by an acquaintance? Was alcohol involved? Is an investigation underway? What action has been taken or is contemplated by campus and local authorities?

Such a statement is also an effective opportunity for the university to remind the community of the need to participate in rape prevention programs and activities. Not only will this help the university to be perceived as taking an active role in addressing a difficultproblem, but it will alert students concerned about a rape, including witnesses, past victims, and women fearing an attack, that there are numerous easily accessible resources available to them. While it might seem that publicizing campus rapes would frighten prospective students, there is evidence of just the opposite effect: "At one state university with an extensive and well-publicized rape prevention program, applications and enrollment of women actually increased."[48]

Counterintuitively, a high number of reported rapes at a given university may well be a sign of successful acquaintance rape policies and efforts. Where women do not feel the system is working for them, they are deterred from coming forward to report an attack. For example, in the wake of a widely-publicized campus acquaintance rape where the accused is let off with a trivial penalty, victims might not see the point in reporting an attack to an administration that does not promote justice.

In addition to publicizing the occurrence of a campus rape initially, the university should keep the campus and local communities apprised of significant developments in the case, and especially, of the ultimate disposition of any disciplinary hearing resulting from the rape. As mentioned earlier, "[s]anctions must not be kept confidential

46. Ehrhart & Sandler, Campus Gang Rape: Party Games?, at 9.

47. *Id.* at 16.

48. *Id.* at 12.

if the resolution of the incident is to transmit a clear message to the campus as to what conduct is and is not acceptable."[49]

As with other official steps taken in the aftermath of an acquaintance rape, the university should consult with the victim before preparing a press statement. It is particularly important to respect her wishes regarding anonymity[50].

Separating Victim from Accused

An effective, but sometimes difficult to accomplish, way of removing pressure from a rape victim is to take steps to ensure that the victim is not obliged to continue living in close proximity to her attacker or to see him in classes if she does not wish to. In accounts by college women who have been raped by acquaintances, the painful and debilitating, even terrifying experience of recurring encounters with the attacker is a recurring theme[51]. Prompt attention to rearranging living and classroom situations is a relatively low-cost way for the university to help assure a woman's safety and to demonstrate that it takes campus rape very seriously. Therefore, a woman reporting an acquaintance rape incident involving an alleged attacker who lives close-by should always be given the option to relocate immediately into other housing.

Victims' advocates would have the university go even farther by giving the victim a choice of moving or having the accused student move[52]. Opting for the latter, however, may create serious problems for the university. First, the university risks biasing its judicial process by taking an action that, while appropriate from the victim's point of view, bears the stamp of judgment against the accused student before a campus hearing even begins. Further, a policy that allows for the immediate relocation of a student accused of acquaintance rape and, more particularly, for his immediate removal from classes attended by the victim would, in most states, be a violation of that student's due process rights.

Perhaps the most even-handed approach to protecting the victim is a policy that allows her to move and, if necessary, to be accompanied to any classes she shares with the accused student. In addition,

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49. *Id.* at 11.

50. *Id.* at 10.

51. Many victims report being harassed and humiliated by their assailants subsequent to a rape. Adams & Abarbanel, SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES CAN DO, at 22.

52. Legislation recently passed in Minnesota requires colleges to shield a rape victim from contact with the alleged assailant, "including transferring him to other housing or classes if necessary." The legislation was passed partially in response to the Carleton College incidents. Halvorsen, *Crime Bill Tries To Address Rape Problem*, at 1B, 2B.

the alleged rapist can be advised of the charge and notified that any attempt to contact the victim will be regarded as harassment. Where necessary, a restraining order can be obtained from a local court pending disposition of the case.

Reporting Crime Statistics

Provision for reporting the incident to governmental authorities in conformity with the Student Right-to-Know Act and the Crime Awareness and Campus Security Act should also be in place. The protocol should contain procedures for ongoing case management, including a mechanism to keep the victim and the accused informed of case status and progress.

Personnel

Expertise is critical to the counseling and support of a rape victim[53]. Rape counselors are specially trained, for example, to be non-directive, yet firm and supportive to a woman in the traumatic aftermath of a rape. A college must decide the extent to which it wants to cultivate this expertise in-house and the extent to which it chooses instead to rely on independent rape crisis centers. Expecting counselors who have no training in rape trauma to respond to a victim is likely to result in serious malpractice.

Independent Counselors

Outside expertise has the advantage of independence from any potential conflict of interest. A rape victim's claim that she was discouraged or dissuaded by the college from pressing charges against a rapist, or inhibited in collecting evidence that could have been used for prosecution, could be extremely damaging to the college. Use of outside counselors avoids any appearance of bias, whatever course the victim ultimately chooses to follow.

Sexual Assault Services Coordinator

Where it is utilized, in-house expertise should be localized and accessible. A designated "sexual assault services coordinator" could serve in this capacity. This person "would train judicial board mem-

53. There is currently a dramatic lack of acquaintance rape expertise and trained support at American colleges. One study found that over 33% of schools made no information on acquaintance rape available to students. Seventy percent of schools had no trained staff available to help victims deal with the aftermath of rape or to report on acquaintance rape for legal requirements. Andrea Parrot, *Do Rape Education Programs Influence Rape Patterns Among New York State College Students?*, Paper presented at the 33rd Annual Meeting of the Society for the Scientific Study of Sex, (November 1-4, 1990).

bers, safety officers, counselors, and medical personnel; confer with university counsel; monitor all cases; and provide support for victims and alleged assailants."[54] Such a coordinator can also act as a liaison to community organizations and to local officials and police. By collecting information on sexual assaults at the college, the coordinator could, within limits of confidentiality, keep the administration and the university community apprised of the scope of the problem[55]. A sample job description for a Coordinator of Sexual Assault Response Services is provided in Appendix Four[56].

Crisis Management Team

Because it is impossible to predict when a particular instance of acquaintance rape will precipitate a public outcry, it is essential that every institution have a crisis management team, which is fully trained and ready to go into action when a rape is reported[57]. Such a team is typically comprised of a senior administrator, university counsel, and representatives from the campus police, the counseling office, student health, student affairs, campus housing, community affairs and, where appropriate, victim advocacy. Its purpose is to centralize and control the institution's responses to the crisis. The team's various functions are to make sure that the victim receives all possible assistance, that investigation of the crime proceeds in the most effective manner, that the institution speaks to the public with one voice and that the members of its community are fully supported in their attempts to deal with the crime. One of its members should be the institution's sole spokesperson.

To accomplish its mission, it is essential that the crisis management team maintain a high level of training in techniques to deal with the various emergencies to which it may have to respond (in this instance, a rape). Another essential element is the establishment of a communications system so that the team can be called together whenever it is needed and can communicate throughout the crisis. Finally, the crisis management team needs to have various alternative centers from which to work during a crisis, so that it will not be put out of action by a disaster or a building take-over, and so its opera-

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54. Andrea Parrot, *Recommendations for College Policies and Procedures to Deal with Acquaintance Rape*, in Parrot and Bechhofer, ACQUAINTANCE RAPE: THE HIDDEN CRIME, at 376.

55. Stanford University, *Final Report of the Task Force on Sexual Assault*, at 11.

56. The Stanford Task Force made the creation of such a position one of its principal recommendations. The university, however, decided it lacked the money to hire a coordinator. *Campus Life: Stanford: Task Force Seeks Revised Handling of Rape Charges*, N.Y. TIMES, February 10, 1991, at 49.

57. Andrea Parrot, *Recommendations for College Policies and Procedures*, in Parrot & Bechhofer, ACQUAINTANCE RAPE: THE HIDDEN CRIME, at 376. The University of Northern Illinois has been very successful at handling acquaintance rapes with its rapid response team model.

tions will not become entangled in the routine business of the institution.

Designating the members of a crisis management team is only the first step in creating an effective response to a campus crisis. With the help of experts, and after rehearsals to debug the procedures, the team needs to develop plans for responding to a wide range of campus crises, of which a major violent crime such as rape is a principal example. After the plans are complete, they need to be rehearsed and modified whenever experience provides an opportunity to test their effectiveness in action.

Victim Advocate

A sensible measure for an institution that does not have a rape services coordinator is to have a designated "victim advocate," trained in rape issues, who can accompany and assist the victim through the difficult steps following the reporting of a rape: questioning, medical examination, deciding between options, approaching the police, etc. It does not matter whether the victim advocate works through an off-campus rape crisis center, is affiliated with student health services, is an administrator, is the coordinator of the campus rape services, or is a trained volunteer. What is important is that the advocate be designated in advance, be available, and be trained to deal specifically with rape victims. The victim advocate can also have an important function as complainant in campus judicial proceedings, as described more fully below in the discussion of disciplinary hearings.

III. INTERNAL DISCIPLINARY PROCEDURES FOR ACQUAINTANCE RAPE CASES[58]

Disciplinary hearings involving campus acquaintance rape present immense procedural challenges to institutions of higher education. By definition, these cases force the institution to choose between two of its students in circumstances having overwhelming ramifications for both, a situation almost totally outside the institu-

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58. This section considers features of the university hearing process that appear to present unique concerns for handling an acquaintance rape case. No attempt is made to offer a comprehensive discussion of disciplinary hearings and the legal considerations that surround them. There is considerable literature on this subject. *See, e.g.*, James M. Picozzi, Note, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L.J. 2132 (1987); Emogene C. Wilhelm, Note, *Academic or Disciplinary Decisions: When is Due Process Required?* Campbell v. Board of Education, 6 U. BRIDGEPORT L. REV. 391 (1985); Edward J. Golden, *Procedural Due Process for Students at Public Colleges and Universities*, 11 J.L. & EDUC. 337 (1982); H.L. Silets, *Of Students' Rights and Honor: The Application of the Fourteenth Amendment's Due Process Strictures to Honor Code Proceedings at Private Colleges and Universities*, 64 DENV. U. L. REV. 47 (1987); Douglas R. Richmond, *Students' Right to Counsel in University Disciplinary Proceedings*, 15 J.C. & U.L. 289 (1989).

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tion's educational objectives. In addition, as mentioned earlier, most acquaintance rape cases are extremely difficult to resolve factually, since the only direct witnesses are usually the accused and the accuser. Finally, because the potential outcomes are so catastrophic, the hearing process inevitably comes to have the trappings of a criminal trial. As a result, the hearing body is confronted with the full gamut of court room issues: contradictory evidence, lack of witnesses, the desire for confidentiality, inconsistent definitions of the underlying offense, and disagreement over the meaning of crucial elements such as "consent" and the accused rapist's "intent."

As the outcome of the hearing will inevitably have life-altering ramifications for either or both the accused and the victim, the hearing body will have to deal with conflicting sympathies for the obviously-injured victim, as well as for the accused, who could be destroyed by a false accusation. In some cases, the hearing will have to be conducted against a background of intense publicity on campus or beyond, with the campus community potentially divided into factions, each poised to scrutinize and decry every aspect of the hearing process and decision. Furthermore, in some instances the shadow of a criminal prosecution will darken the process, adding to the hearing body's concerns a fear of affecting the ultimate trial adversely and/or of being dragged into a very public criminal trial as witnesses.

In light of the features and concerns unique to a campus acquaintance rape hearing, a university cannot take a business-as-usual approach to the procedures it employs to resolve such charges internally. Just as the administration's response to the rape itself needs to be orchestrated in advance, the hearing process cannot be impromptu. This portion of the monograph will argue that a university needs special procedures, as well as a specialized disciplinary body, to conduct acquaintance rape hearings. The discussion focuses first, however, on the external constitutional requirements which will shape the hearing process.

The most recent Supreme Court statement on what is required by way of due process reiterates the skeletal nature of the constitutional requirements[59]. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and opportuni-

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59. Public and private universities may be held to somewhat different standards in the conduct of their disciplinary hearings. Private universities are not normally "state actors," therefore, their actions do not directly trigger constitutional protections. However, through the application of a hybrid of traditional contract doctrine and constitutional limitations applied in spite of the absence of state action, "the law appears to be moving toward a similarity of treatment" for public and private institutions. Richmond, *Students' Right to Counsel in University Disciplinary Proceedings*, at 308-09 (footnote omitted). As a pragmatic matter, therefore, administrators at private universities could well design their policies on the assumption that constitutional limitations are applicable.

ty for hearing appropriate to the nature of the case.' Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)." [60] The Court went to some effort, however, to point out that not much more is required:

> The essential requirements of due process... are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. See Friendly, "Some Kind of Hearing," 123 U.Pa.L.Rev. 1267, 1281 (1975). The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.[61]

Of particular importance to college disciplinary proceedings is the Court's conclusion that the defendant has no constitutional due process right to confront, i.e. cross-examine, the opposing witnesses.

It is worth noting that the constitutional norms that dictate what is fair, what is required, and what is permissible in college disciplinary hearings in America respond to the likelihood that it will be the defendant who will bring a legal challenge to a campus adjudication. Therefore, much of the following discussion focuses on the protection of accused students, "defendants," because for a university wishing to insulate its disciplinary proceedings from judicial intervention or subsequent allegations of negligence, that is where the focus must be. However, the university must not lose sight of the victim in its efforts to create a disciplinary system which is procedurally proper. The following discussion of campus disciplinary proceedings complements the discussion of a victim's rights and privileges starting on page 22.

Procedure

Confidentiality

In general, confidentiality should be provided to both the victim and the accused to the extent consistent with protecting the greater good of the campus community and complying with state and federal reporting requirements. Until a university imposes sanctions, for example, an accused student is entitled to absolute confidentiality.

In conformity with rape shield laws, which typically limit distribution of police records dealing with rapes and sexual assaults, the hearing should be closed to all but the victim. However, the Buckley Amendment no longer requires that the record of criminal acts be treated as part of a student's confidential academic records[62]. And,

60. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985).

61. *Id.* at 546.

62. The Family Educational Rights and Privacy Act, 20 U.S.C.A. §§ 1232f-4 (West 1990), *amended by* 20 U.S.C.A. § 1232g(a)(4)(B), (b)(6) (West Supp. 1993).

despite the urgings of some in the campus press, a public hearing is not constitutionally required[63].

Composition of the Fact-Finding Body

As is evident from the previous discussions of the various aspects of an acquaintance rape case, it is very difficult to conduct such a case fairly, hear evidence, and apply non-intuitive standards such as consent and intent, without specialized knowledge. In the criminal courts, the jury receives that knowledge through the judge's instructions and the opposing lawyers. Few, if any, college disciplinary proceedings include these elements because they are, by design, intended to avoid legal formalism. In an acquaintance rape case, however, the enormously high stakes for the parties and the institution demand precise understanding of all these points.

Rather than simply hope that an ad hoc panel, or a panel used for everyday campus disciplinary matters, will be able to master these rather complex issues, a college should consider designating a special panel to hear acquaintance rape cases. The members of such a panel would receive special training in understanding sexual assault crimes and in evaluating the sort of evidence generated in an acquaintance rape case. The panel would be made familiar with such issues as "the similarities and differences between stranger and acquaintance rape, common patterns of occurrence, usual victim reactions, and reporting patterns."[64] It would also be sensitized to the need not to draw negative inferences from a defendant's silence, when he faces the threat of parallel criminal prosecution.[65]

Some commentators are concerned that such a panel could be "captured" by political activists whose bias would eliminate the fairness sought by its special designation[66]. One way to avoid this problem, while, at the same time, permitting the special training proposed, is to bifurcate the hearing body. Most universities now include student representatives on all disciplinary hearing panels. The training required and the value of cumulative experience argue strongly against the use of students on acquaintance rape hearing

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63. *Zanders v. Louisiana State Board of Education*, 281 F. Supp. 747 (W.D. La. 1968); *Hart v. Ferris State College*, 557 F. Supp. 1379 (W.D. Mich. 1983).

64. University of Southern California, External Review Committee, *An Evaluation of the University of Southern California's Sexual Assault Policies, Procedures, and Programs* (review draft) 31 (April 1992) (on file with author).

65. For a fuller discussion of desirable training for an acquaintance rape hearing panel, see Andrea Parrot, *Institutional Response: How Can Acquaintance Rape Be Prevented?*, in Parrot & Bechhofer, ACQUAINTANCE RAPE: THE HIDDEN CRIME, at 355.

66. Gary Pavela, *Should Colleges Resolve Sexual Assault Cases?*, 4 SYNTHESIS: LAW AND POLICY IN HIGHER EDUCATION, 276, 277 (1992).

panels. But this is not to say that students should be entirely excluded. After all, students have an important perspective on dating mores, gender relations, and communication problems among their peers. One way to bring a student perspective to the process, and yet avoid a takeover, would be through the use of a "jury" of students who could hear the evidence during the hearing and report their conclusions to the panel. Using this system, conviction of rape could require agreement of both the panel and the student jury, while the panel might impose sanctions for a lesser included offense, in those instances where the panel and the jury disagreed.

Regardless of which structure is chosen, a college must avoid a situation in which the administrator investigating the complaint is also the sole decisionmaker. Unseparated powers of this sort give the appearance of partiality and, in a blatant case, could be deemed a denial of due process[67]. Schools using a single hearing officer, as opposed to some form of panel in a serious, disciplinary case are in the minority[68]. As an extra safeguard on impartiality, some schools follow the practice of asking an accused student, on the record, whether he challenges the impartiality of any hearing panel member[69].

Rapid Hearing

Regardless of who hears the evidence, all defendants are entitled to a rapid hearing. Not only does this promote the goal of fairness, it provides a sense of resolution for members of the campus community, including the victim and accused[70]. One student sued her university after sloppy disciplinary action on the part of the university. Among the flaws cited by the student was prolonged delay: the disciplinary board took months to convene, and the hearing was not held until summer, after one of the accused had graduated[71].

Hearing Room

Many victims of acquaintance rape are frightened enough at the thought of encountering their assailants on campus, let alone at a

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67. See Picozzi, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, at 2140.

68. Golden, *Procedural Due Process for Students at Public Colleges and Universities*, at 359.

69. This practice is followed at Duquesne University. Edward N. Stoner II, *Due Process and the Duquesne University Judicial System: An Introduction 6 (August 1981, revised September 1983)* (attachment to outline of remarks at NACUA Annual Conference, "Student Conduct and Behavior: Legal Practical, and Institutional Advantages of Commencing College Disciplinary Proceedings Where Criminal Charges Are Pending Against a Student for Alleged Serious Misconduct," (June 28, 1985)) (available from NACUA).

70. Stoner, *Student Conduct and Behavior: Legal, Practical, and Institutional Advantages of Commencing College Disciplinary Proceedings Where Criminal Charges Are Pending Against a Student for Alleged Serious Misconduct*, at 5.

71. Denise Kalette, *Rapists Are Rarely Prosecuted: Few Schools Encourage Reporting*, USA TODAY, Nov. 30, 1990, at 6A.

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hearing in a tiny, windowless, room. Consideration of these emotions suggests that the disciplinary hearing should be held in a room large enough to enable the victim and the accused to be separated by adequate physical space. Attention to this small, but important, detail will help to maintain an atmosphere in which both the victim and the accused feel capable of participating in the proceedings, and the other participants are shielded from the physical manifestations of the parties' emotions.

Joint Hearings

Joint hearings are an option in cases involving multiple assailants. The virtue of a joint trial is that it frees the victim from having to testify repeatedly to the same facts, prolonging an emotionally difficult task. One drawback of a joint trial is the potential for a circus-like atmosphere, which can be difficult for a hearing panel to manage. A joint trial may also make it difficult for one perpetrator to report the actions of another perpetrator truthfully.

Transcript

Due process in an academic disciplinary setting has never been held to require a verbatim transcript, either stenographic or electronically recorded. However, having an accurate recording of an event as serious for all parties as an acquaintance rape hearing is very worthwhile. For example, a record is vital for internal appeal where the ultimate decisionmaker has no opportunity to hear the evidence, as in the case of an appeal to the university president or board of trustees. There, a transcript is the only basis for an intelligent decision as to the fairness of the proceeding. Similarly, a record is critical to demonstrating good faith, a fair hearing, and proper notice, if the college is sued by an accused student on grounds of defective process.

As the cost of a stenographic transcript is likely to be prohibitive, most institutions will use tape recording. To be effective, however, a tape recording must pick up all conversation accurately. This requires careful placement of microphones, a multitrack recorder, full-time monitoring of the system and discipline on the part of the participants. It is not sufficient to put a portable dictating machine on the table and turn it on. Fairness requires that, if a college records its proceedings, it should make copies available to the students involved without restriction[72].

72. Stoner, *Due Process and the Duquesne University Judicial System: An Introduction*, at 12.

Representation

The Complainant

Some universities follow a practice of requiring a victim of acquaintance rape to act as the complainant/prosecutor in a campus disciplinary hearing; as such, the victim must investigate, bring the case, produce evidence, marshall witnesses, and meet the burden of proof. While this approach may make sense in the context of less personally traumatic conduct code violations, it is inappropriate in an acquaintance rape case. It is simply not realistic to expect the victim of a rape to assume both the role of detective and prosecutor in the campus judicial system. Such a requirement would not only deter victims from pursuing internal remedies, but it would also place an unfair burden on them, and would most likely reduce the usefulness of the campus judicial system in dealing with the acquaintance rape problem.

A better approach is to assign an administrator to serve as the complainant in all acquaintance rape cases, someone who can be specially trained in the presentation of evidence, standard of proof, and related issues. If a university chooses to designate a victim advocate as part of its acquaintance rape response team, as described in the previous section, this person would be ideally suited to also serve as the complainant in disciplinary proceedings resulting from allegations of acquaintance rape.

The Respondent

The most common objections to the participation of lawyers in college disciplinary hearings are that they will obstruct the process and they will create an unnecessarily combative atmosphere. Resolving the issue of lawyers' participation requires answers to two questions: whether to allow the accused the use of a lawyer at all and, if so, what that lawyer should be allowed to do.[73]

Because the consequences of an adverse finding will be devastating to a student accused of acquaintance rape, the institution should make every effort to assure him of fair treatment, including assistance by counsel. An additional factor weighing in favor of representation by counsel is the threat of subsequent criminal prosecution for rape (discussed on page 43). At least one court has held that, where a

73. A third question is whether the university has any affirmative obligation to provide the accused with a lawyer. However, doing so would be a tremendous financial drain on a university; and it is clear that the law does not require it.

student is subject to a pending criminal charge, due process requires that he be allowed the assistance of counsel[74].

The threat of criminal prosecution adds to the gravity of missteps or procedural misjudgments by an accused student during an acquaintance rape hearing, particularly if he fails to object to evidence, replies to questions when he is better advised to remain silent, and fails to collect or produce important evidence of his own. The student may not even be aware that the entire disciplinary proceeding could become evidence in a criminal prosecution, or that the evidentiary standard in a campus proceeding is lower than in a criminal court. Furthermore, he is, in most cases, ill-prepared to judge the repercussions of present strategic choices on a district attorney's decision to prosecute, or on a future criminal trial.

Allowing counsel to participate in the disciplinary hearing should help to reduce the risk that the accused will subsequently attack the proceedings as unfair; even if he does, it should at least reduce the possibility that a court would find the proceedings defective. Permitting counsel to advise the accused, therefore, is one way that a college can reduce its liability exposure[75].

Allowing a lawyer to participate in a carefully documented procedural plan need not derail the proceedings or prevent the university from acting through a lay hearing body unfettered by legalisms. But to avoid these eventualities the process must be set out fully, and must provide a counterbalance to the outside lawyer. Usually this role is given to university counsel, who must be able to state the strictures of the disciplinary rules to defense counsel commandingly.

What role should a defense attorney be allowed to play? One course is to limit the lawyer to assisting and advising the accused student in the preparation of his case, but not to permit the lawyer to question witnesses, address the hearing body, or answer for the student. While there is one federal court which has held that a student facing disciplinary hearings has a right to obtain and be actively represented by an attorney, the case has not been followed[76].

The current state of the law appears to be that, unless there is a threat of criminal prosecution or the university decides to proceed through its own counsel, a student has no absolute right to have an

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74. *Gabrilowitz v. Newman*, 582 F.2d 100 (1st Cir. 1978).

75. Note that where the university uses its counsel to act as complainant, some courts will find that the defendant must then be allowed retained counsel to assure a fair proceeding. *French v. Bashful*, 303 F. Supp. 1333 (E.D. La. 1969) (Where prosecution of students before discipline committee at tax-supported college was conducted by a senior law student who later became a member of the bar and who was chosen to prosecute because of his familiarity with legal proceedings; due process denied by refusal to permit participation by defendants' retained counsel.)

76. *Marin v. University of Puerto Rico*, 377 F. Supp. 613 (D.P.R. 1974).

attorney present during the hearing on his case[77]. By allowing a student the advice of counsel, rather than full representation, the student's interests can still be addressed, without the lawyer being allowed to intrude on the process to the point of becoming an obstacle or of dominating the hearing.

On the other hand, where a student faces criminal prosecution, there are few good reasons why a university should try to prevent him from protecting his interests through the advice of a lawyer. In *Gabrilowitz v. Newman* (a case holding that, where criminal charges are pending, a student at a public university must be allowed the assistance of retained counsel) the court noted that while the presence of counsel would not remove all risks for a student in the precarious position of defending two interactive charges, a lawyer could help the student make an intelligent and informed choice between the risks presented[78]. In the end, the burden imposed on the university by permitting a lawyer to be present is a relatively light one, and there is little to be gained by attempting to enforce a no-attorney policy. "In most cases, universities incur far greater administrative and financial burdens by contesting students' right to counsel than they would if they allowed attorneys' participation."[79]

Standard of Proof

The standard of proof against which a university hearing board will weigh evidence of an acquaintance rape should be fixed in advance and stated clearly in the code of conduct and similar materials. Doing so promotes uniformity and notice, two elements of due process.

There are two schools of thought on the appropriate standard of proof. One view is that the hearing board should not distinguish between cases of acquaintance rape and any other disciplinary infraction; rather, it should apply the same standard of proof in all campus hearings. A single standard has the advantage of promoting uniformity and clarity within the campus judicial system. On the other hand, it is difficult enough to introduce lay personnel to such legal technicalities as standard of proof; to expect them to administer multiple standards is unrealistic. According to this view, using more than one standard will result in confusion.

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77. *See, e.g., Gorman v. University of Rhode Island*, 646 F. Supp. 799 (D.R.I. 1986), *modified*, 837 F.2d 7 (1st Cir. 1988)(where no criminal charges stem from the incident in question, there is no student right to counsel at disciplinary hearing)(abandoning *Marin*, 377 F. Supp. 613).

78. 582 F.2d at 106.

79. Richmond, *Students' Right to Counsel in University Disciplinary Proceedings*, at 311 (footnotes omitted).

Others advocate the application of a more stringent and higher degree of proof for exceptionally serious offenses, such as acquaintance rape, where sanctions include suspension or expulsion, as well as loss of reputation[80]. This view holds that requiring a greater quantum of proof sends a signal to the campus community that the administration regards acquaintance rape as a particularly serious offense, worthy of special treatment in the judicial system. In confronting acquaintance rape, for example, the institution could state that it has a special response team, a special complainant, a specially trained hearing panel, special rules about confidentiality and other procedures —and along with these measures goes a special standard of proof. A student accused of acquaintance rape is not treated in the same manner as a student accused of less serious conduct code violations.

Whether a university opts for a single standard or for multiple standards, it must resolve the question of which standard of proof to use in acquaintance rape cases before the first case is heard. While there is no "correct" answer, a standard that is either too lenient or too severe will cause problems. Too low a threshold will provide an insufficient guarantee of the rights of the accused and may run afoul of the law. In *Smyth v. Lubbers*, a federal case addressing the issue of a campus judicial system's standard of proof[81], Grand Valley State College's disciplinary procedures were held inadequate, in part because the school's standard of proof required only "substantial evidence."

Too strict a standard, on the other hand, will introduce a substantial obstacle to the university's important purpose of maintaining a peaceful community and fulfilling its educational mission. The experience of universities, such as Stanford, which have attempted to administer justice using the "proof beyond a reasonable doubt" standard, suggests that such a criminal standard is ill-suited to a civil, administrative proceeding[82]. The threshold created by this standard requires the person presenting the evidence to prove the necessary facts definitively and, therefore, implies power to amass the necessary information. Such power is rarely given to the complainant in university disciplinary proceedings.

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80. See Nicholas Trott Long, *The Standard of Proof in Student Disciplinary Cases*, 12 J.C. & U.L. 71, 81 (1985).

81. 398 F. Supp. 777 (W.D. Mich. 1975).

82. Use of the beyond-a-reasonable-doubt standard "makes it almost impossible to successfully bring a case before Stanford's disciplinary committee." *Campus Life: Stanford: Task Force Seeks Revised Handling of Rape Charges*, N.Y. TIMES, Feb. 10, 1991, at 49. The "beyond-a-reasonable-doubt" standard also seems to have been used at Princeton University and the University of Virginia. Karla H. Fox, *Due Process and Academic Misconduct*, 25 AM. BUS. L. J. 671, 687 n.108 (1988).

The government, in a criminal case, uses subpoena powers to obtain this information: disclosure of evidence is compelled and witnesses are summoned. But a university has no corresponding power to compel even student witnesses to cooperate. As a result, it will find its efforts to maintain campus order severely hampered by use of such a strict standard. As one commentator points out,

> [e]ven the loss of liberty attendant [to] civil commitment to a mental hospital has not been deemed sufficient to invoke the 'beyond a reasonable doubt' standard. If a person can be committed involuntarily on less than proof 'beyond a reasonable doubt,' surely a student may be expelled on less than the same quantum of proof.[83]

Given the disadvantages of standards that are either too strict or too lax, an intermediate standard of proof seems the best choice for a campus disciplinary hearing. There are two conventional standards to consider in this regard: proof by a "preponderance of the evidence" and proof that is "clear and convincing." While each of these standards would almost certainly pass judicial muster if challenged on due process[84] grounds, the "clear and convincing" standard has substantial advantages.

Proof by a preponderance of the evidence really means that guilt is "more likely than not." A strong argument can be made that this bare tipping of the scales is an insufficient basis for action in most disciplinary cases. Because of the severity of potential sanctions, a court judging the elemental fairness of a college's disciplinary process in an acquaintance rape case is likely to be disturbed by the proposition that the defending student can be found guilty if it is simply more likely than not that he was the perpetrator. An additional problem with the "preponderance" standard is that it presumes a level playing field, i.e. that the accused student and the university have equal ability to represent themselves in the proceedings, to investigate, and to marshal "proof-producing resources."[85] This assumption flies in the face of reality, especially at an institution where a student is not allowed representation by counsel or, in the extreme, is not even allowed the assistance of counsel in disciplinary proceedings.

A much better choice would be the "clear and convincing" standard, which protects a defendant's interests by assuring that he does not lose university privileges or affiliation unless there is good evidence which makes it appear that he committed the act in question. At the same time, this standard does not erect an insurmountable

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83. Long, *The Standard of Proof in Student Disciplinary Cases*, at 80.

84. Though private institutions are not directly subject to constitutional requirements, due process notions have successfully been applied to them under contract theories. *See Clayton v. Trustees of Princeton University*, 519 F. Supp. 802 (D.N.J. 1981); *Tedeschi v. Wagner College*, 404 N.E.2d 1302 (N.Y. 1980).

85. Long, *The Standard of Proof in Student Disciplinary Cases*, at 80.

threshold for colleges. Finally, the clear and convincing standard offers a safe harbor from a due process attack on disciplinary proceedings. One can at least imagine a situation in which a court would find a preponderance standard inadequate (a fourth-year medical student expelled on the basis of marginally reliable evidence), but it is unlikely that a court would overturn a disciplinary outcome which rests on a finding of "proof based on clear and convincing evidence."

Evidence

General Rules for Submission of Evidence

The evidentiary rules which are applied in criminal and civil courts have emerged over the centuries of the Common Law's development as a way to control juries of lay people. Their application outside that context is likely to be confusing and perverse to laypeople and lawyers, alike. In general, therefore, the rules controlling the admission of evidence in college disciplinary proceedings ought to reflect the concept of essential fairness and the common knowledge of the members of the panel, rather than the rules of evidence in the state court. For example, since laymen do not ordinarily accept unfounded statements as being persuasive of a particular fact, it is appropriate to exclude such statements from evidence received by the panel (e.g. the statement, "I think X was at the Tap on that Friday, because I've seen him there on Fridays before," should be excluded).

The rules controlling the admission of evidence also have an impact on the threshold of difficulty established for conviction. As mentioned above, criminal statutes require a jury to find the defendant guilty "beyond a reasonable doubt," and the rules of evidence reinforce the severity of that standard by preventing the admission of all but the most objective evidence. However, while this means that conviction rates for acquaintance rapes in the courts tend to be low,[86] the fact that a case would be impossible to prove in the criminal courts does not, necessarily, mean that a university code of conduct could not impose a sanction on the basis of that same evidence:

> University boards are guided by their own behavioral codes, not necessarily the criminal law, so that behavior that will not support a criminal conviction may still be a punishable violation of university rules. Theoretically, then, a university may be

86. "It is difficult to get a trial, let alone a conviction, when the victim is raped by a husband or boyfriend, is hitchhiking, or is under the influence of alcohol or drugs at the time of the rape." STANFORD UNIVERSITY, WORKING AGAINST RAPE, *quoted in* Jean O'Gorman Hughes & Bernice Resnick Sandler, "FRIENDS" RAPING FRIENDS: COULD IT HAPPEN TO YOU? 7 (Center for Women Policy Studies, 1987).

free to define sexual assault in a manner different from the criminal law. In the case of date rape, where there are often evidentiary problems, or where juries may still be reluctant to convict, universities can still impose penalties."[87]

Thus, hearsay, which is generally inadmissible in a trial, need not necessarily be excluded in a college judiciary proceeding. For example, if a woman told a roommate a day or two after the alleged incident that she was raped, testimony from the roommate as to what the victim said could provide important corroboration to her story, and it could be acceptable in a college's fact-finding process, even though it would not be admissible in a criminal trial.

A successful hearing process is flexible enough to be fair to both sides, while still allowing the hearing panel to make a judgment on all the proffered evidence. A standard for that judgment will combine a sense of fairness with a recognition of what members of the community treat as persuasive in their normal day-to-day discourse concerning serious issues.

The Victim's Past

Rape shield laws can be incorporated into the evidentiary rules for acquaintance rape cases to prevent a victim's irrelevant sexual history from being brought up; otherwise, she may not be willing to participate as a witness.[88] By contrast, past sexual relations with the assailant are generally considered relevant.[89]

Cross-Examination of the Victim

A college would be ill-advised to go forward with an acquaintance rape hearing in which the victim does not participate as a witness. In almost all cases, the outcome will turn on the credibility of her story. Those charged with reaching a decision will be in a better position to assess this credibility if she responds to questions. On the other hand, the victim may be unwilling to come forward, to file an internal charge, or to go through with a hearing if she thinks she is going to be grilled about embarrassing or upsetting events by a hostile questioner, or suffer a direct confrontation with the accused. In the end,

87. Letter to the editor from Sarah E. Wald, Dean of Students, Harvard Law School, *On Campus Rape, the University Can Help*, N.Y. TIMES, September 25, 1991, at A22.

88. In a disciplinary hearing held by the college, one victim of a fraternity gang rape described her cross-examination in the following terms: "My past was brought up like I was an alcoholic nymphomaniac. The guys in question didn't have to go through any of this. I was the victim and I was made to feel like a guilty person." *Quoted in* Margie Friedman, *To Wild Guys at a Party, Rape Isn't a Crime. It's a Spectator Sport.*, MADEMOISELLE, July 1985, at 104, 165. The specter of such an inquisition will deter many women from reporting incidents, lodging internal or civil or criminal complaints, or testifying about an attack. *See* Ehrhart & Sandler, CAMPUS GANG RAPE: PARTY GAMES?.

89. Parrot, *Recommendations for College Policies and Procedures to Deal with Acquaintance Rape*, in Parrot & Bechhofer, ACQUAINTANCE RAPE: THE HIDDEN CRIME, at 375.

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face-to-face cross-examination of the victim by the accused student or his attorney maximizes the victim's ordeal, but provides the best defense for the defendant. Herein lies the dilemma of cross-examination in an internal disciplinary hearing. The law provides no useful guidance, since there is no constitutional due process requirement creating a right to confront adverse witnesses.[90]

On the other hand, it is essential for the accused to be able to respond to the victim's testimony. If he cannot observe her testifying, he will not be able to rebut inaccuracies in her statements and inferences from her manner of presentation. Responding to a transcript is not sufficient because the nuances of communication are lost. One possible compromise that encourages the testimony of a victim reluctant to speak in front of her assailant, while preserving the ability of the accused to respond to her allegations, is to allow him to watch her testimony remotely, either on a closed circuit or on a taped video.

In lieu of cross-examination of the victim by the accused, the accused can be permitted to observe the testimony and to then have his questions filtered through the hearing panel. Alternatively, the questions can be in writing, a form that is less confrontational, although extremely time-consuming. Where cross-examination is not permitted, it is essential that the hearing body understand that it has a heightened duty to probe the credibility of both parties.

Sanctions

One of the major sources of tension in campus acquaintance rape proceedings has been the sanctions which colleges and universities impose upon a finding of guilty. This tension arises in part from the public perception that there is a contrast between the way rape is treated under the criminal law and the way that it has historically been treated in college disciplinary proceedings. In this view, a person found guilty of rape by a court of law always receives a prison sentence, whereas a student found guilty of rape by a college disciplinary board is likely to receive a slap on the wrist.

To the extent that this perception is accurate, any sanction less than immediate expulsion would be inexplicable (and likely to arouse

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90. The Constitution generally has not been held to require confrontation and cross-examination of witnesses by the accused in an administrative disciplinary proceeding. *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 159 (5th Cir. 1961)(university not required to provide "a full-dress judicial hearing, with the right to cross examine witnesses"); *Winnick v. Manning*, 460 F.2d 545 (2d Cir. 1972); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985) (constitutional minimum for a defendant's hearing prior to adverse administrative action include oral or written notice of the charges against him, an explanation of the evidence, and an opportunity to present his side of the story; to require more than this "would intrude to an unwarranted extent on the government's interest....").

lawsuits and other, more direct, protests). Fortunately, this perception is not entirely accurate.

What is not widely understood is that there are differences between the options available to a jury in a criminal trial and those available to the college hearing body, on those occasions when the fact-finders feel less than certain about what really happened. In a criminal trial, the fact-finder (jury) is bound by the presumption of innocence and its corollary, the beyond-a-reasonable-doubt standard for conviction. As a consequence, there are convictions only when the members of the jury have no doubt that the victim is telling the truth and the defendant is not. In any case in which the jury has doubts, the defendant must go free.

By contrast, in a college disciplinary hearing, there is room for a range of results. In those cases where there is no doubt that a rape occurred, college fact-finders will probably impose expulsion. On the other hand, in those cases where there is some doubt, instead of acquitting the defendant completely, college fact-finders will often impose a penalty (short of expulsion), probably because they think something happened, but are willing to assign their own ideas of relative responsibility to the sanction imposed. Because the process of arriving at this assignment of responsibility is always hidden, it appears to the general public that the defendant was found guilty of rape, but received a meaningless sanction.

If this analysis of the imposition of sanctions in college acquaintance rape cases is correct, institutions wishing to avoid wide-spread outcries have a choice of either imposing a monolithic penalty for all convictions of rape or finding some way to explain the considerations which led to the imposition of a lesser sanction, so that their validity can be judged by the public. The difficulty of fitting such an explanation into the parties' expectations of confidentiality might be reason enough to adopt the monolithic approach. It may seem even more appropriate when, despite a public outcry which is pushing legislators in the direction of mandatory penalties, those who are perceived to be convicted rapists are allowed to continue as students.

In the process of determining what sanctions to impose, the institution can, where appropriate, invite the victim to deliver a "victim impact statement" or perhaps suggest an appropriate penalty. Not only is her view relevant to the sanctioning process, but official recognition of her statement helps her to feel included in the campus judicial proceedings. This goal is important because it is easy for the victim to feel marginalized and even re-victimized where procedures essentially pit the university against the accused student.

As mentioned above under the heading, Press Statement, sanctions (as opposed to the proceedings leading up to the imposition thereof) should rarely be kept confidential.[91] In an effort to protect the reputation of the perpetrator though, some institutions have also enforced confidentiality on the outcomes of disciplinary hearings. Such "sealed sanctions" are questionable, however. The victim may well be distressed by the outcome of a judicial process that does not inform her of its results, and members of the campus community may assume that the sanctions were overly lenient if the school does not disclose what they were. At one institution, for example, failure to disclose the decision of a hearing body investigating a fraternity gang rape incident so incensed the faculty that it formed a committee to, in turn, investigate the administrative process. The committee recommended that future incidents of sexual assault be investigated fully and that resolutions of incidents "transmit a clear message as to what conduct is and is not acceptable on this campus."[92]

Appeal

The right to an appeal is an important procedural safeguard; therefore, the university's disciplinary code should state clearly whether and how an appeal is to be presented. The composition of the appellate body should be specified and the grounds for appeal should be listed in the code of conduct. Unless the appeal includes the right to have factual determinations reconsidered by the appellate panel, it is important to limit the grounds for an appeal to bias and/or procedural unfairness in the initial hearing.

External Issues

Parallel Criminal Prosecution

A student accused of acquaintance rape in a campus disciplinary hearing may also be criminally charged or may have reason to fear being criminally charged. The student in this situation faces enormous risks and difficult choices. He can defend himself actively in the disciplinary hearing, and thereby risk incriminating himself and

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91. It will be objected that the Buckley Amendment (The Family Educational Rights and Privacy Act, 20 U.S.C.A §§ 1232f-4 (West 1990)) prevents disclosure of a student's education records. It does, but that does not also mean that it prohibits publication as a part of a sanction. The distinction is that the terms of a sanction may appropriately be announced as part of the sanction, but, thereafter, be protected from disclosure when the record of the sanction is available only in the student's education records. What is being suggested in the present instance is that an institution ought to include in its conduct code the provision that the final result of a disciplinary hearing involving acquaintance rape will be announced to the institutional community.

92. Sanday, Fraternity Gang Rape, at 77-78.

exposing the strengths and weaknesses of his case to a district attorney. Indeed, his performance at the hearing may actually lead to a charge. Alternatively, the student can refrain from active participation in the hearing, leaving himself less vulnerable to criminal prosecution, but dramatically increasing his chances for suspension or expulsion.[93] Many universities encourage such a result by allowing negative inferences to be drawn from a student's decision to remain silent in disciplinary hearings.[94]

Where a parallel criminal case is pending, the university may decide to await resolution of the criminal proceedings before instituting its own internal proceedings.[95] This option is usually urged by prosecutors who do not want to expose key witnesses to examination by defense counsel before a trial can take place. And, while this may be appropriate action for some offenses, it is not necessarily appropriate for a typical, non-violent, acquaintance rape case. The delay associated with waiting for resolution of a criminal trial and exhaustion of appeals, which can take years, is likely to be unacceptable, and leaves the university open to liability for allowing a suspected rapist to remain at the institution. One critic of this practice, who recommends immediate expulsion for rapists, said "You can't wait for criminal trials. Another victim can be created."[96]

When criminal charges are pending, a student ought to be allowed assistance of counsel.[97] The lawyer for the accused may contend, for example, that commencing university disciplinary action prior to commencing or resolving a parallel criminal action is unfair, and may attempt to delay the university proceedings.[98] A university must, therefore, balance the risk of potential negative fallout for the defendant in a parallel criminal proceeding against its important educational and security responsibilities.

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93. Richmond, *Students' Right to Counsel in University Disciplinary Proceedings*, at 300.

94. Golden, *Procedural Due Process for Students at Public Colleges and Universities*, at 345-59 (1982). *But see Nzuve v. Castleton State College*, 335 A.2d 321, 326 (Vt. 1975) (The Fifth Amendment guarantee against self incrimination extended to a student accused of rape so that his silence during a university disciplinary procedure could neither be used against him in the internal procedure nor in later criminal proceedings.).

95. The University of Kansas has such a policy, stating that, "Ordinarily, the University should not impose sanctions if public prosecution of a student is anticipated or until law enforcement officials have disposed of the case." The University of Kansas, You and the University of Kansas, Student Handbook (1988-89), *quoted in* Richmond, *Students' Right to Counsel in University Disciplinary Proceedings*, at 312.

96. *Fraternity Incident*, College Security Report (now Campus Security Report) (Rusting Publications, Port Washington, N.Y.), October 1989, at 7.

97. *Gabrilowitz*, 582 F.2d 100; Comment, *Constitutional Law—Procedural Due Process—Student has Right to Have Attorney Present at University Disciplinary Hearing When Criminal Charges Are Pending—Gabrilowitz v. Newman*, 1978 B.Y.U.L. Rev. 722.

98. In one example, a student claimed a Fifth Amendment right to complete her criminal case before commencement of a college disciplinary hearing against her for selling illegal drugs. *Hart*, 557 F. Supp. 1379. The claim was rejected. *Id.* at 1385.

The interest of the university most often lies in a prompt hearing, particularly because it demonstrates a commitment to solving the problem, enables a campus community to begin healing sooner, assuages the fears of the victim, reduces uncertainty for the accused, and avoids exposing the campus community to the danger of a violent person for an unnecessary length of time. Courts have seemingly accepted this logic by consistently holding that it is not proper to enjoin a university disciplinary hearing pending resolution of a criminal action.[99]

To deal with inconsistencies between internal and external proceedings, the university can provide that silence will not be used against a student in a disciplinary hearing involving conduct that might also constitute a criminal act. Indeed, a college might choose to afford a fifth-amendment-style privilege to all students charged in formal disciplinary proceedings.[100] At least one court has mandated that students be afforded fifth amendment protection during university disciplinary proceedings.[101] It should also be noted that, in some cases, it may be possible for the university to secure a promise from the district attorney that evidence from campus disciplinary proceedings will be excluded from the criminal case.[102]

Waiving Related Charges

One more way that institutions might encourage reporting of acquaintance rape is to assure victims that they, in turn, will not be charged with any violations of the disciplinary code. For example, there have been instances in which women who make rape charges are themselves charged or threatened with a charge of a disciplinary

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99. *Nzuve*, 335 A.2d at 326 (Accused student was denied injunction postponing college disciplinary proceedings until completion of external criminal proceedings because he was "permitted to remain silent, without his silence being used against him" at both the college and criminal proceedings.); *Furutani v. Ewigleben*, 297 F. Supp. 1163, 1165 (N.D. Cal. 1969) ("expedited college hearings pose no threat to Fifth Amendment rights....College authorities should be free to enforce fair and reasonable disciplinary regulations necessary to the orderly functioning of the educational institution.") *See* Stoner, *Student Conduct and Behavior: Legal, Practical, and Institutional Advantages of Commencing College Disciplinary Proceedings Where Criminal Charges Are Pending Against a Student for Alleged Serious Misconduct*, at 3. One factor often noted in this regard is delay: a criminal trial date may be well in the future, it may be delayed, and years of appeals can follow a trial. *Goldberg v. Regents of the University of California*, 57 Cal. Rptr. 463, 476 (Cal. Ct. App. 1967) (Awaiting outcome of parallel criminal proceeding would be "highly impractical and inconsistent with the functions of an educational institution.") (Footnote omitted).

100. One model code contains the following language: "A person may assert the privilege against self-incrimination as to possible criminal exposure during a civil proceeding (citation omitted). In the college disciplinary setting, the student may remain silent, and such silence should not be used against the student, (citation omitted) but a violation of the Student Code may nevertheless be found based upon the other evidence presented." Edward N. Stoner II & Kathy L. Cerminara, *Harnessing the "Spirit of Insubordination": A Model Student Disciplinary Code*, 17 J.C. & U.L. 89, 105 (1990).

101. *See Nzuve*, 335 A.2d at 326 (Fifth Amendment guarantee against self-incrimination extended to student accused of acquaintance rape so that his silence during a college disciplinary proceeding could not be used against him.).

102. *See Grossner v. Trustees of Columbia University in the City of New York*, 287 F. Supp. 535, 551 (S.D.N.Y. 1968).

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code violation because they were drinking at the time of the rape.[103] A policy of waiving such charges may very well encourage reporting of instances of acquaintance rape in its most common context.

CONCLUSION

The subtitle of this monograph proclaims that it offers, "A Model For Institutional Response." It may well be that the intended model has been obscured in a welter of detail; therefore, it is probably best to conclude by reiterating what the author believes a model response to acquaintance rape would include.

First, an institution should take whatever steps are neccessary to prevent acquaintance rape from occuring on its campus. To do this, it should define acquaintance rape in the most direct terms and specifically prohibit it in its conduct code. It should then convey the prohibition in ways carefully selected to reach and impress potential victims and potential rapists. It should also evaluate the environment on its campus with an eye toward reducing the number of situations which encourage acquaintance rape.

Second, the institution should make plans to manage the way in which acquaintance rape cases are handled. The key elements in this risk management are training, implementation of protocols which will be used to guide each step taken in response to acquaintance rape on campus, and development of a response team charged with handling such crises.

The third element of the model is the careful construction of disciplinary procedures for dealing with a charge of acquaintance rape. The institution must determine when and if it will refer cases for off-campus criminal prosecution. It must also create a fully-detailed code of procedure, including a standard of proof, a rule on representation by attorneys, standards for the admissibility of evidence, the grounds for appeal and the sanctions to be imposed.

A word of warning about this model: it is entirely conceptual and it would be a mistake to imagine that it is applicable to all colleges and universities, as written. It is intended only as a skeleton of ideas that needs to be fleshed out to meet the special needs and circumstances of particular institutions and the predicaments in which they may find themselves.

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103. Adams & Abarbanel, SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES CAN DO, at 5 (Victim reporting sexual assault by two students who were members of school tennis team and fraternity brothers told by administration that if she pursued internal hearing she might be disciplined for having consumed alcohol illegally on campus).

One final word of caution, even to an institution which has successfully completed the arduous task of implementing all three elements of the model. It is not enough for a university to have a well thought-out acquaintance rape prevention program, to enunciate good principles in the code of conduct and supplementary literature, and to set up specialized hearing procedures that address the unusual issues raised by a acquaintance rape case. However well-intentioned the policies, protocols, procedures, and programs may be, they will be crippled if the university does not enforce them. Too often, campus administrators are tempted to deviate from official guidelines because "informal" measures seem more "comfortable in the situation." While the desire, in a tightly knit academic setting, to cope with unpleasant business on an informal basis may be understandable, falling into this pattern invites the very problems that acquaintance rape procedures, policies, protocols, and programs are designed to avoid. In short, the model is worthless, unless it is used.

APPENDIX ONE

RESOURCES

Videotapes

It Still Hurts, Auburn University, Campus Crime Prevention Programs, P.O. Box 204, Goshen, KY 40026 (first part portrays an acquaintance rape scenario, the second presents interview with victim illustrating psychological consequences).

Not Only Strangers, Centron Films, Coronet/MTI, 108 Wilmont Road, Deerfield, IL 60015 (depicts acquaintance rape scenario and deals with reactions of victim and her roommate).

"The Party" and "The Dorm", Swarthmore College, Swarthmore, PA 19081 (two vignettes on acquaintance rape designed to be shown during freshman orientation workshops; workshop outline also available).

Rethinking Rape, Stanford University, 171 La Honda Road, Woodside, CA 94062 (interviews with six rape victims developed in conjunction with student-run Rape Education Project).

Sexual Assault: A Chance to Think, University of Maryland, Public Information Officer, Police Department, University of Maryland, College Park, MD 20742 (publicly-funded student production depicting common campus sexual assault scenarios).

Pamphlets, Booklets, Articles

Aileen Adams & Gail Abarbanel, Sexual Assault on Campus: What Colleges Can Do, Rape Treatment Center, Santa Monica Hospital Medical Center, 1225 Fifteenth Street, Santa Monica, California 90404 (1988), 50 pp. $5.00 per copy (analyzes the problem of sexual violence on campus and proposes a model sexual-assault policy for college and university administrators).

Acquaintance Rape—Is Dating Dangerous?, American College Health Association (1987).

Sexual Assault: A Guide for Men and Women, Boston University Task Force on Violence and Harassment (not dated).

Max C. Bromley & Leonard Territo, College Crime Prevention and Personal Safety Awareness, Charles C. Thomas, Publisher, Springfield, IL (1990), 120 pp. (emphasizing economic consequences to a university of failure to provide adequate security).

Rape Awareness and Prevention, The Center for Women's Services, Plymouth State College, Plymouth, NH (not dated, currently being revised and updated). (This excellent example of an informational pamphlet directed primarily at women students about rape contains sections on rape criminology, why rape happens, a "what to do if you are raped" protocol, a six-step awareness and prevention checklist, and sources of help from a sexual assault crisis team to the campus ministry.)

Date Rape: Crossed Signals on Saturday Night, same source as above (not dated, currently being revised and updated). (This is a consciousness raising pamphlet aimed at both sexes. It contains a hypothetical acquaintance rape scenario, discussions of the events from a male and female perspective, sections on what women want men to know and what men want women to know, suggested ground rules for college sexual relationships, and general suggestions for improving communications and avoiding the occurrence of acquaintance rape situations.)

Julie K. Ehrhart & Bernice R. Sandler, CAMPUS GANG RAPE: PARTY GAMES? (1985). (This thoughtful booklet treats campus acquaintance gang rape as a distinct subject presenting issues not present in single-rape incidents. It contains sections on the role of fraternities, the role of alcohol and drugs, the role of pornography, a list of resources, and extensive recommendations for universities.) Available from the Center for Women Policy Studies, 2000 P Street, NW, Suite 508, Washington, DC 20036. Tel. (202)872-1770.

Jean O'Gorman Hughes & Bernice R. Sandler, "FRIENDS" RAPING FRIENDS: COULD IT HAPPEN TO YOU? (1987). Excellent anatomy of an acquaintance rape, suggestions to women for avoiding situations that might lead to acquaintance rape, what to do if someone tries to force you to have sex, what to do if you are raped, rape trauma. Available from Center for Women Policy Studies; see above.

Organizations

Center for Women's Policy Studies, 2000 P Street, N.W., Suite 508, Washington, DC 20036.

Association of American Colleges, 1818 R Street, N.W., Washington, DC 20009.

National Council for Research on Women, New York.

Alternatives to Fear, 1605 17th Avenue, Seattle, WA 98122 (publishes and distributes literature on acquaintance rape).

APPENDIX TWO

SAMPLE VICTIM'S BILL OF RIGHTS TO BE INCORPORATED IN DISCIPLINARY CODE[104]

The right of a victim to have a person or persons of her or his choice accompany her or him throughout the disciplinary hearing.

The right to remain present during the entire proceeding.

The right, as established in state criminal codes, not to have her or his irrelevant past sexual history discussed during the hearing.

The right to make a "victim impact statement" and to suggest an appropriate penalty if the accused is found in violation of the code.

The right to be informed immediately of the outcome of the hearing.

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104. Reprinted from Adams & Abarbanel, SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES CAN DO, at 21-22.

APPENDIX THREE

SAMPLE PROTOCOL FOR VICTIMS OF SEXUAL ASSAULT[105]

Any time you are informed by a student that she has been a victim of sexual abuse or sexual assault you should do the following:

1. Ascertain whether or not the victim needs immediate medical assistance. Ask the victim directly if she is all right physically. Explore this issue beyond initial questioning and observation if you feel it is necessary.

2. Make sure the victim has as much privacy as she desires when she speaks with you. Having anyone else in the room should be the victim's decision. Ask the victim if she wants someone with her at the time of your conversation. If a third party is present, assure yourself that this person will hold the information in strictest confidence.

3. Find out what the victim's most critical concern is and respond in a non-judgmental, informed way.

4. Advise the victim of options regarding further steps in the process. Some of the options relate to personal, medical matters and some to legal, practical matters. Note that if the assault has just occurred, some of the medical options need to be addressed quickly, while other decisions may be deferred temporarily depending on the particular circumstances and concerns of the student involved. The victim may choose to do one or more of the following:

   a. **Call the Rape-Crisis Coordinator Directly.** The victim may wish to discuss the incident with the Coordinator in person or on the telephone. Tell the victim that the Coordinator will be called and informed anyway as a matter of protocol, and encourage the victim to call the Coordinator herself. Tell the victim that the Coordinator is specially trained to counsel victims of sexual assault. The Coordinator will provide a formal assessment of the victim's immediate medical and psychological needs. She will also evaluate the victim's needs over time, provide some ongoing counseling and support, and assure longer-term follow-up on personal concerns.

   b. **Go to the Emergency Room.** The victim may wish to go directly to the local medical center for medical help and/or a forensics analysis. The medical center is the *only place where evidence necessary for medical and/or forensic evaluation and court testimony can be collected.* Advise the victim not to shower, bathe, or change clothing prior to going to the Emergency Room as this will destroy important physical evidence.

      For physical evidence to be useful, it is best collected within 12–24 hours and no later than 5 days after the assault. The collection of medical evidence does not presume that charges will be pressed against the assailant. As part of evidence collection, the Emergency Room protocol involves testing for pregnancy and sexually transmitted diseases. The Emergency Room personnel will also offer the victim immediate psychiatric services, as well as local victim advocacy services.

      NOTE: the Emergency Room protocol is very formal and rigorous. The Coordinator should automatically be called to escort the victim to the Emergency Room and through the necessary procedures. If the Coordinator is unavailable the RA or the dean-on-call should escort the student to the Emergency Room where a nurse will assume the role of "companion" during the procedures.

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105. Adapted from Dartmouth College, Dartmouth College Sexual Assault Protocol, Protocol for Victims of Sexual Assault 2 (1991).

The victim should be informed that current Emergency Room protocols require that certain authorities or College offices be informed of the incident. She should expect that at least the following individuals may be notified that an assault has occurred: the Coordinator of Sexual Awareness and Abuse Programs, the College Proctor in the Department of Safety and Security, the local police chief or his designate, the Dean of the College and the Director of the College Health Service.

c. **Go to College Health Services.** The victim may wish to go directly to the college's health service. The health service clinicians will follow a formal sexual assault medical protocol including (1) tests for sexually transmitted diseases, (2) in the case of a female victim, a pregnancy test and counselling regarding the availability of the morning-after pill, and (3) referral to the Coordinator of Sexual Awareness and Abuse Programs for counseling. The victim should know that immediate testing (within 48 hours) is ideal.

d. **Call Campus Police.** The victim may wish to report the incident to the campus police, who will (1) contact the local police department, (2) give a written report to the Dean of the College, (3) call theCoordinator, (4) call the Dean-on-call, and (5) provide transportation if necessary.

e. **Call the Police.** The victim may wish to report the incident directly to the local Police Department. Unless an investigation will be compromised or jeopardized by doing so, the local police generally inform the campus police when they receive a substantiated report of a sexual assault involving a college student. The police, however, are not required to notify the College, and may be willing to consider the victim's wishes when determining whether the institution should be informed.

The local police ordinarily will not release to the media the specific details of a sexual assault investigation (including identification of the parties involved), without a court order. However, if one or more assailants are charged, or warrants are obtained during the course of the investigation, the supporting documents may become part of the public file. Although the police make every effort to satisfy their legal obligations in these documents without identifying the victim, there may be situations where they are unable to do so.

Students should also be advised that they cannot control the extent of an investigation, or the outcome, once the local police become involved. Although the police will give the victim's wishes serious consideration, there may be circumstances (multiple assaults, for example) where local authorities determine that the evidence is sufficient and justice requires that one or more assailants be charged despite the victim's objection. Students should know that local prosecutors will counsel them about their involvement in a criminal case (some victims have elected to consult and retain local attorneys to represent their interest in the courts, but it is certainly not necessary to do so). They should also know that you, the Coordinator, the deans and others are available to support them throughout this process.

f. **Contact the Class Dean.** The class deans are always available to provide personal and administrative support. Under appropriate circumstances, the class deans can assist in making arrangements to extend deadlines for class assignments, postpone exams, change class schedules to separate victim and assailant, and change housing situations. The class dean can also provide information about the university's formal judicial process.

g. **Contact the Disciplinary Board.** If the victim is an undergraduate and is interested in information about the undergraduate disciplinary process and how it might apply to her case, a meeting with the Disciplinary Board Representative should be arranged as soon as possible. At that meeting, the Representative will describe the disciplinary process and review what the student's participation in the process would involve so that she could make an informed decision whether or not to file a formal complaint. In particular, the Secretary will explain, and the College

officials should note, that filing a formal complaint is not equivalent to issuing a disciplinary charge. Once a formal complaint is received, the Board will investigate and bring disciplinary charges when appropriate under the Code of Conduct prohibition against "acquaintance rape." Factors that will be considered in the decision to bring charges will include the extent and quality of the evidence available to the Board, the victim's wishes, whether there are criminal charges pending against the alleged assailant(s), and whether the assailant(s) is (are) presently enrolled at the College.

h. **Call Family.** The victim may wish to speak with her parent(s). The College strongly encourages open communication between parents and students. In the event that the victim is under 18, parents will be notified.

i. **Contact a Friend.** The victim may wish to seek support from a trusted relative, friend, clergy member, etc.

j. **Contact External Legal Services.**

k. **Take No Action.** The victim may wish to do nothing other than have this conversation.

APPENDIX FOUR

SAMPLE JOB DESCRIPTION: COORDINATOR OF SEXUAL ASSAULT RESPONSE SERVICES[106]

Description of Role and Responsibilities:

The coordinator of Sexual Assault Response Services works with a wide variety of University and community individuals and groups for the coordination of services and advocacy provided to victims/survivors of sexual assault and for coordination of existing and new prevention education efforts.

The primary responsibilities of the coordinator are:

1. To serve as a university-wide advocate for victims/ survivors of sexual assault.
2. To offer immediate crisis-intervention and short-term counseling services to victims/survivors and to refer them to appropriate campus and community resources.
3. To provide information and support for victims/survivors and, at their request, accompany them to meetings with University and local officials and police.
4. To coordinate university-wide sexual assault education and prevention efforts.
5. To coordinate existing campus and community resources so as to make them easily accessible and responsive to the needs of the victim/survivor.

While not precluding reporting sexual assault to other University offices, the coordinator will serve as the highly visible person whom victims/survivors can contact for assistance. The coordinator will provide crisis intervention services, short-term counseling, and information concerning campus and community counseling.

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106. Adapted from Stanford University, *Final Report of the Task Force on Sexual Assault*, Appendix 4, at 2.

The coordinator will collect information on all reports of sexual assault on campus and, subject to confidentiality issues, regularly report to the administration and larger University community. These reports will include evaluations of current services and recommendations for improved services and protocols.

The coordinator will maintain a working relationship with appropriate community resources such as the local Rape Crisis Center.

The office of the Coordinator will house the activities of all student groups participating in prevention education related to sexual assault.

Education and Experience:

Candidates should have education and background in both prevention education and in short-term counseling. A master's degree in counseling, public health, health education, or social work is preferred. At least two years experience working with the victims/survivors of trauma, including sexual assault, is desirable, as is particular knowledge of the issues relating to acquaintance rape. Familiarity with the behaviors and developmental issues of college age students and knowledge of the university community is desired.

Candidates should demonstrate ability to work one on one with victims/survivors as well as ability to work with a wide variety of University officials and students, individually and in groups. Because the issue of acquaintance rape can be particularly sensitive and controversial, the ability to persuade and strongly argue positions without unduly alienating others is required.

Demonstrated speaking and writing skills are required, as are the abilities to develop written materials, to orchestrate media campaigns, to educate the community about sexual assault, and to operate independently.

APPENDIX FIVE

THE AFTEREFFECTS OF ACQUAINTANCE RAPE: HELPING THE VICTIM[107]

Victims/survivors of sexual assault may experience emotional trauma caused by the loss of trust, control, self-esteem, power and judgment. Common symptoms include shock, fear, anxiety, depression, withdrawal, loss of normal coping mechanisms, insomnia, and headaches. The healing process begins when victims/survivors are able to tell someone about their experience. The initial care and support they receive can help reduce the sense of loss. For this reason, it is crucial that respondents understand and be sensitive to the emotional aftereffects of sexual assault. Specifically, respondents should be aware that:

- Many victims/survivors of acquaintance rape do not immediately identify their experience as rape. They may feel that something is wrong, i.e. emotional upheaval, depression, but may not connect their feelings with the assault.
- Many victims/survivors feel that they are to blame for the assault. This accounts for their feelings of shame and self-doubt.

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107. Adapted from Robin Warshaw, I Never Called It Rape: The Ms. Report on Recognizing, Fighting, and Surviving Date and Acquaintance Rape 65 (1988).

- Victims/survivors experience different emotions at different times and in different ways. There is no "correct" reaction and no average length of time between assault and disclosure of the experience.

The following guidelines are offered by counseling experts as advice to those who want to help someone recover from the trauma of sexual assault:

1. Support the victim/survivor
   A. Accept what you hear. Many acquaintance rape victims/survivors fear that their experience will be minimized as "not important."
   B. Listen. Allow victims/survivors to disclose as little or as much about the assault as is comfortable for them.
   C. Comfort them. Be reassuring in a gentle, non-disapproving way. Avoid questions that are judgmental. Don't ask questions that suggest that victims/survivors are responsible for their assailant's conduct, such as "Why didn't you say 'no'?"
   D. Help victims/survivors organize their thoughts, but let them decide how to proceed. Support their decisions. Try to separate how you feel about what has happened from what is best for their own recovery.
   E. Because a critical part of healing is regaining some sense of control over their lives, victims/survivors must be allowed to direct their own recovery and to have control over their thoughts, feelings and actions.
2. Assure victims/survivors that you will keep conversations confidential.
3. Encourage victims/survivors to call the Coordinator of Sexual Assault Services, the local Rape Crisis Center or the psychological counseling center.
4. Provide information about and offer to arrange for medical attention.
5. Provide information about and offer to arrange for counseling.
6. Discuss judicial and legal options, both internal and external.
7. Discuss advantages of talking with police, even if they do not want to file an official report or press charges at that time. Police can provide current information about options and resources.
8. Help victims/survivors think about other people they might talk with about the assault (e.g., close friends or family members). Reassure them that it is their decision to contact any of these people, but encourage them to assemble a support network that makes sense for them.
9. Provide information on University resources, such as class deans who can rearrange housing situations, class schedules, or academic deadlines.
10. Provide information about preserving evidence.

APPENDIX SIX

SAMPLE ACQUAINTANCE RAPE POLICY STATEMENT[108]

The Berkeley Campus will not tolerate sexual assault in any form, including acquaintance rape. Where there is probable cause to believe that the Campus' regulations prohibiting sexual assault have been violated, the Campus will pursue strong disciplinary action through its own channels. This discipline includes the possibility of suspension or dismissal from the University.

A student charged with sexual assault can be prosecuted under California criminal statutes and disciplined under the Campus' code of student conduct. Even if the criminal justice authorities choose not to prosecute, the Campus can pursue disciplinary action.

APPENDIX SEVEN

SAMPLE FRATERNITY POLICY STATEMENT[109]

SEXUAL ABUSE: The Fraternity will not tolerate nor condone any form of sexually abusive behavior on the part of its members whether physical, mental or emotional. This is to include any actions that are demeaning to women including, but not limited to, acquaintance rape, gang rape, or verbal harassment. Any such actions will be cause for expulsion of individual offenders and/or charter suspension (*The Record of Sigma Alpha Epsilon*, 1987).

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108. Quoted in Adams & Abarbanel, SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES CAN DO, at 18.

109. *Quoted in Id.* at 29. This position statement was included in a pamphlet that was sent to each chapter house and distributed to new fraternity members.

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One Dupont Circle, N.W.
Suite 620
Washington, D.C. 20036
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FAX 202-296-8379